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The Curse of *Miles v. Apex Marine Corp.*: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases

Robert Force*

Maritime personal injury claims require careful analysis of the status of the parties because of the important distinctions that flow therefrom. A Jones Act¹ cause of action may be invoked only by a *seaman*² and may be asserted only against the *seaman's employer*,³ including employers to whom the seaman may have the status of a borrowed servant.⁴ The Jones Act requires proof of negligence to support recovery.⁵ An action for unseaworthiness, a remedy created by the Supreme Court under its constitutional authority to develop rules of maritime law referred to as the "general maritime law," may be invoked only by a *seaman*⁶ and may be asserted only against the *owner* of a vessel.⁷ An action for unseaworthiness is not based on fault and requires only a showing that the seaman's injury was caused by an unseaworthy condition of the vessel.⁸ Additionally, a seaman has a right under the general maritime law to recover for maintenance and cure. This remedy is not based on fault and is considered an

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1. Prior to the enactment of the Jones Act, 46 U.S.C. app. § 688 (1988), in *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903), the Supreme Court held a seaman does not have a cause of action against his employer for injuries caused by the negligence of the master or crew. This holding was legislatively overruled by the Jones Act, which, through the incorporation of the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (1988), specifically created such an action and eliminated the fellow servant doctrine (§ 51), contributory negligence (§ 53), and assumption of risk defenses (§ 54). *The Osceola*, however, also held a seaman did have an action against the owner of the vessel on which he served (which at that time was invariably the vessel of his employer) for injuries caused by the unseaworthiness of the vessel. It has been suggested the earlier unseaworthiness cases seemed to require the unseaworthy condition be the result of negligence; but, if that were ever the rule, it was clearly put to rest in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926 (1960). Today, the seaman's unseaworthiness action is viewed as being a species of strict liability and may be established without any showing of negligence.

2. *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129, 80 S. Ct. 247 (1959).

3. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970); *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231 (3d Cir. 1991).

4. *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202 (5th Cir. 1983).

5. *Gaddis v. Orgulf Transp. Co.*, 680 F. Supp. 1279 (S.D. Ill. 1988).

6. *Stephenson v. McLean Contracting Co.*, 863 F.2d 340 (4th Cir. 1988), *cert. denied*, 490 U.S. 1085, 109 S. Ct. 2110 (1989); *Spearmen v. United States*, 690 F. Supp. 1435 (E.D. Pa. 1988).

7. *Cerqueira v. Cerqueira*, 828 F.2d 863 (1st Cir. 1987). *See also* Charles M. Davis, *Maritime Law Deskbook* 90 (1991).

8. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926 (1960).

incident of employment.⁹ Actions by *seamen* against *non-employers* may be brought under the general maritime law and are predicated on tortious conduct such as negligence,¹⁰ but proof of negligence including the causation element under the general maritime law is more demanding than under the Jones Act.¹¹

Maritime workers such as *longshoremen* have an action under the general maritime law for injuries caused by the negligence of others,¹² except to the extent this has been modified by Congress. Congress has taken away both Jones Act negligence and unseaworthiness remedies which the courts had extended to longshoremen (*Sieracki* seamen).¹³ However, Congress, in Section 905(b) of the Longshore and Harbor Workers Compensation Act (LHWCA), has preserved the right of maritime workers to sue vessel owners for injuries and death caused by the negligence of a vessel owner.¹⁴ Congress has also preserved on behalf of maritime workers all other remedies for injuries caused by persons who are not their employers or vessel owners.¹⁵ However, Congress has modified the rights of maritime workers by prohibiting actions against a worker's employer, except in limited situations in which the employer is also the vessel owner,¹⁶ and has provided maritime workers with a form of workers' compensation under the LHWCA.¹⁷ Persons, such as *passengers*, who are neither seamen nor maritime workers have an action under the general maritime law against those whose *negligence* or other tortious conduct causes them injury.¹⁸

9. *Warren v. United States*, 340 U.S. 523, 71 S. Ct. 432 (1951).

10. *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231 (3d Cir. 1991); *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173 (5th Cir. 1981), *cert. denied*, 456 U.S. 983, 102 S. Ct. 2256 (1982); *Turner v. Niagara Frontier Transp. Auth.*, 748 F. Supp. 80 (W.D.N.Y. 1990).

11. *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231 (3d Cir. 1991); *Petersen v. Chesapeake & O. Ry.*, 784 F.2d 732 (6th Cir. 1986); *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173 (5th Cir. 1981), *cert. denied*, 456 U.S. 983, 102 S. Ct. 2256 (1982); *Allen v. Seacoast Prods., Inc.*, 623 F.2d 355 (5th Cir. 1980); *Davis v. Hill Eng'g, Inc.*, 549 F.2d 314 (5th Cir. 1977); *Turner v. Niagara Frontier Transp. Auth.*, 748 F. Supp. 80 (W.D.N.Y. 1990). See also Robert Force, *Allocation of Risk and Standard of Care Under the Jones Act: "Slight Negligence," "Slight Care"?*, 25 J. Mar. L. & Com. 1, 4-5 n.4 (1994).

12. See Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 905(b), 933 (1988). See also *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202 (1953).

13. The Jones Act is unavailable as a remedy to non-seamen. See Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 902(3)(G) (1988); *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 66 S. Ct. 869 (1946). Unseaworthiness of the vessel is unavailable as a cause of action to maritime workers under the LHWCA. See Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 905(b) (1988).

14. Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 905(b) (1988).

15. Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 933 (1988).

16. Compare Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 904, 905(a) (1988) with § 905(b) (1988). See also *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S. Ct. 2541 (1983) (allowing a maritime worker to collect both workers' compensation under the LHWCA and tort damages against an employer who was also vessel owner).

17. See Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-948a (1988 & Supp. V 1993).

18. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406 (1959);

Initially, maritime law followed the common law and provided no action for wrongful death and no survival action.¹⁹ The Jones Act created both wrongful death and survival actions on behalf of a decedent *seaman's* dependents and his estate.²⁰ Congress also enacted the Death on the High Seas Act (DOHSA), thereby creating a wrongful death action on behalf of dependents of *any person* who is killed through the tortious conduct of another in navigable waters three miles from the shore of any state.²¹ The Supreme Court later created a similar action under the general maritime law for "longshoremen" who are killed within the three mile limit or on inland waters.²² Some lower federal courts have recognized a survival action to accompany existing legislative or judicially created wrongful death actions.²³

Not only does the existence of a cause of action and the elements thereof depend on the status of the parties, but the items of damage that may be recovered may vary as well. Prior to *Miles v. Apex Marine Corp.*,²⁴ one could generalize that, in all personal injury cases, damages for pecuniary loss and pain and suffering are recoverable.²⁵ Different rules are applicable in death cases where, under the Jones Act and the DOHSA, the decedent's dependents may recover only their financial loss occasioned by the decedent's death.²⁶ Furthermore, the Jones Act provides for a survival action which enables the decedent's estate to recover for the decedent's pain and suffering, lost wages, and funeral expenses.²⁷ Any action under the general maritime law (but not under the Jones Act or the DOHSA) also permitted recovery for loss of consortium (also called loss of society)²⁸ and allowed awards of punitive damages.²⁹ Thus, in maritime personal injury and death actions, the status of the plaintiff,

Beard v. Norwegian Caribbean Lines, 900 F.2d 71 (6th Cir. 1990).

19. See *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140 (1886).

20. Jones Act, 46 U.S.C. app. § 688 (1988).

21. Death on the High Seas Act, 46 U.S.C. app. § 761 (1988).

22. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970).

23. See, e.g., *Evich v. Morris*, 819 F.2d 256 (9th Cir.), cert. denied, 484 U.S. 914, 108 S. Ct. 261 (1987); *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.* 466 F.2d 903 (8th Cir. 1972).

24. 498 U.S. 19, 111 S. Ct. 317 (1990).

25. *Downie v. United States Lines Co.*, 359 F.2d 344 (3d Cir.), cert. denied, 385 U.S. 897, 87 S. Ct. 201 (1966).

26. The DOHSA only authorizes recovery for pecuniary loss. Death on the High Seas Act, 46 U.S.C. app. § 762 (1988); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010 (1978). The Jones Act, as interpreted by the courts, allows a beneficiary to recover only for pecuniary loss and not for recovery of non-pecuniary damages. See *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 79 (9th Cir. 1983) ("[C]ourts faced with the issue historically have held that non-pecuniary losses are not recoverable under the Jones Act.").

27. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806 (1974).

28. *Id.* *Gaudet* loss of society damages were extended to the spouses of longshoremen injured nonfatally in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S. Ct. 1073 (1980).

29. *In re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981).

the status of the defendant, and the relationship between them have been crucial in determining what right of action, if any, a plaintiff has against a defendant and the damages recoverable in such action.

Enter *Miles*! Neither the facts in *Miles v. Apex Marine Corp.*³⁰ nor the legal issues, which relate to the recovery of damages under the general maritime law for loss of consortium and loss of future wages, are complicated. Ludwick Torregano, a seaman aboard the vessel M/V Archon, was killed by a fellow crew member while the vessel was docked at the port of Vancouver, Washington. His mother,³¹ who was also the administratrix of his estate, brought wrongful death and survival actions against a variety of defendants alleging negligence under the Jones Act and breach of the warranty of seaworthiness under the general maritime law. The merits of these claims are not relevant to the decision of the Supreme Court and will not be discussed. The plaintiff sought damages, *inter alia*, for loss of consortium in her wrongful death action and for loss of future income in the survival action. The Supreme Court had to determine whether she was entitled to recover such damages under the general maritime law.

As a preliminary matter, the *Miles* Court stated: "If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for the wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in *Moragne*."³² In *Moragne v. States Marine Lines, Inc.*,³³ the Court held the widow of a "longshoreman" who qualified as a "*Sieracki* seaman"³⁴ and who was killed in territorial waters could bring an action under the general maritime law for wrongful death against the owner of the vessel based on unseaworthiness.

This consideration by the Court as to whether to "extend" the benefits of *Moragne* to true seamen is a remarkable exercise in semantics and a demonstration of selective amnesia in regard to the evolution of the jurisprudentially created protections for seamen, later "extended" to certain maritime workers. Why should there have been any doubt as to whether the *Moragne* rule was applicable to true seamen? Only seamen have an action for unseaworthiness under the general maritime law; longshoremen as a class do not. The general maritime law remedy based on unseaworthiness was given to the widow of *Moragne* not because her husband was a "longshoreman" but because he was a pseudo-seaman, characterized at the time as a "*Sieracki*" seaman.

Previously, in *International Stevedoring Co. v. Haverty*,³⁵ the Supreme Court held a longshoreman loading cargo in the hold of a ship could bring an

30. 498 U.S. 19, 111 S. Ct. 317 (1990).

31. The decedent's mother was not financially dependent on him. *Id.* at 22, 111 S. Ct. at 320.

32. *Id.* at 30, 111 S. Ct. at 324 (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970)).

33. 398 U.S. 375, 90 S. Ct. 1772 (1970).

34. The term "*Sieracki* seaman" comes from *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946). The status of a *Sieracki* seaman is explained *infra* text accompanying notes 38-40.

35. 272 U.S. 50, 47 S. Ct. 19 (1926).

action under the Jones Act.³⁶ Congress responded to this decision by taking away from longshoremen the right to bring a Jones Act suit by removing their status as Jones Act seamen, a status which had been bestowed by the Court.³⁷ Subsequently, in *Seas Shipping Co. v. Sieracki*,³⁸ the Supreme Court held the warranty of seaworthiness available to seamen should be extended to a longshoreman (stevedore) working on board a vessel. The Court stated:

Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling. . . . It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. *For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.*³⁹

Hence, the *Sieracki* seaman was born. Such "seamen" were not classified as seamen for Jones Act purposes and were *not* entitled to bring an action under the Jones Act or to recover maintenance and cure. They were, however, considered by the courts as seamen entitled to the seaman's remedy for injury caused by unseaworthiness of the vessel until this right of action was taken away by legislation in 1972.⁴⁰ Thus, if *Moragne* had not been classified as a (*Sieracki*) seaman, he would not have been afforded the warranty of seaworthiness extended to all seamen. Furthermore, the primary inquiry in *Moragne* was not whether the Court should create a wrongful death action when "*Sieracki* seamen" are killed in territorial waters, but rather whether it should create a wrongful death remedy under the general maritime law when "seamen" are killed in territorial waters as a result of a vessel's unseaworthiness. At the time *Moragne* was decided, it would have been inconceivable that a *Sieracki* seaman would be afforded greater rights under the general maritime law of unseaworthiness than a true seaman. Conceptually, this would have been impossible because the *Sieracki* seaman's right with respect to the warranty of seaworthiness was derived from the right of true seamen. The impetus for the *Moragne* decision

36. Here the Court was actually construing the term "seaman" as used in the Jones Act, and while the Court recognized that for most purposes "stevedores are not seamen," it nevertheless included them within the protection of the statute. The Court gave weight to the fact the work in which the plaintiff was engaged—stowing freight in the hold—was work formerly performed by members of the crew. *Id.* at 52, 47 S. Ct. at 19.

37. Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 902(3) (1988).

38. 328 U.S. 85, 66 S. Ct. 872 (1946).

39. *Id.* at 99, 66 S. Ct. at 880 (emphasis added).

40. Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 905(b) (1988). The remedy of unseaworthiness may be available to longshoremen who are not covered by the LHWCA. *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981).

was to provide a remedy for true seamen.⁴¹ It was only fortuitous that this result was achieved in a case involving a *Sieracki* seaman. The *Moragne* Court was particularly disturbed by what it described as certain incongruities in the law. Each of these incongruities related to the rights of true seamen.⁴² By repeatedly referring to *Moragne* and to *Gaudet* (the decedent in another important case) as "longshoremen," the *Miles* Court minimized and deflected the *Moragne* Court's concern for the true seaman, and suggested that there was some significance to a factual distinction which, in the opinion of this author, should have been of no consequence to the damages issues before the Court.

A. *Loss of Consortium (Loss of Society)*

Moragne created a wrongful death action based on unseaworthiness for death occurring in territorial waters. The Court, in *Sea-Land Services, Inc. v. Gaudet*,⁴³ later determined the scope of damages recoverable in such actions. *Gaudet* held that, "under the maritime wrongful death remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses."⁴⁴ *Gaudet* was later extended to allow recovery for loss of consortium in cases of personal injury not resulting in death.⁴⁵ Thus, it appeared that the *Moragne-Gaudet* decisions had settled the issue of whether a seaman's family may recover for loss of consortium. Not so, said the *Miles* Court. *Moragne* was not conclusive of the matter before it. *Moragne* involved a longshoreman decedent (a *Sieracki* seaman), whereas in *Miles* the decedent had been a Jones Act seaman (a *true* seaman). This is what prompted the *Miles*

41. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395-96, 90 S. Ct. 1772, 1784-85 (1970). This was acknowledged by the *Miles* Court. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 26, 111 S. Ct. 317, 319 (1990).

42. As condensed in *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 576-77, 94 S. Ct. 806, 810-11 (1974):

The first of these is simply the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law (*here the furnishing of an unseaworthy vessel*) produces liability if the victim is merely injured, but frequently not if he is killed. . . .

The second incongruity is that identical *breaches of the duty to provide a seaworthy ship*, resulting in death, produce liability outside the three-mile limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness—but not within the territorial waters of a State whose local statute excludes unseaworthiness claims. . . .

The third, and assertedly the "strangest" anomaly is that a *true seaman—that is, a member of a ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute.*

(quoting *Moragne*, 398 U.S. at 395-96, 90 S. Ct. at 1784) (emphasis added) (citation omitted).

43. 414 U.S. 573, 94 S. Ct. 806 (1974).

44. *Id.* at 584, 94 S. Ct. at 814.

45. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S. Ct. 1673 (1980).

Court to "extend" the unseaworthiness action under the general maritime law to a true (Jones Act) seaman's dependents before passing on the damages issue. Likewise, because *Gaudet* also had involved a "longshoreman" who was a *Sieracki*, not a Jones Act, seaman, the *Gaudet* Court "had no need to consider the preclusive effect of DOHSA [on the scope of damages] for deaths on the high seas, or [the preclusive effect of] the Jones Act [on the scope of damages] for deaths of true seamen."⁴⁶

Having expressly held that an action based on unseaworthiness is available under the general maritime law for the death of a true seaman⁴⁷ in territorial and inland waters, the *Miles* Court turned to the loss of consortium issue. It began its discussion by observing that, in *Mobil Oil Corp. v. Higginbotham*,⁴⁸ the Court held that damages for loss of consortium recoverable in a general maritime law action for deaths occurring in territorial waters created in the *Moragne-Gaudet* cases would not be extended to supplement actions brought under the DOHSA for deaths occurring beyond three miles from shore. In the DOHSA, Congress limited recovery to "pecuniary loss sustained by the persons for whose benefit the suit is brought."⁴⁹ The Court in *Miles* believed the "logic" underlying *Higginbotham* controlled its decision even though the DOHSA was inapplicable because, in *Miles*, the death occurred in territorial waters.⁵⁰ The Court then looked to the Jones Act, inasmuch as the decedent in *Miles* had been a Jones Act seaman. It noted that the Jones Act incorporates the substantive provisions of the FELA. Although there is no express limitation as to the damages recoverable under the FELA, that statute, from the earliest cases, had been interpreted as precluding recovery for loss of consortium in death actions.⁵¹ The *Miles* Court concluded Congress must also have intended to exclude recovery for loss of consortium from the Jones Act. The Court then extrapolated the FELA rule from the Jones Act and applied it to the seaman's general maritime law claim. Inasmuch as the Jones Act precludes recovery for loss of consortium, "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence."⁵² Thus, the Court in *Miles* held there can be "no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman."⁵³ The Court also opined that its decision to preclude recovery for loss of consortium in actions under the general

46. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31, 111 S. Ct. 317, 325 (1990).

47. An action by or on behalf of a true seaman is the only kind of unseaworthiness action recognized in maritime law today. See *supra* text accompanying note 6.

48. 436 U.S. 618, 98 S. Ct. 2010 (1978).

49. Death on the High Seas Act, 46 U.S.C. app. § 762 (1988).

50. *Miles*, 498 U.S. at 31, 111 S. Ct. at 325.

51. See *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 33 S. Ct. 192 (1913).

52. *Miles*, 498 U.S. at 32, 111 S. Ct. at 326.

53. *Id.* at 33, 111 S. Ct. at 326.

maritime law where a seaman has died in territorial waters had the benefit of introducing uniformity in the law because actions under the general maritime law would now be harmonious both with actions for Jones Act negligence regardless of where death occurs and with actions brought under the DOHSA.

What then are the consequences to be expected from the *Miles* decision? Much depends on how vigorously the Court pursues the twin pillars underlying *Miles*: uniformity and deference to legislation. In the author's view, the Supreme Court has the option to apply *Miles* in either an expansive or restrictive manner. As will be developed, the *Miles* Court did not arrive at its decision by a thorough examination of the history of maritime personal injury law, or by in-depth statutory interpretation, or through an analysis of the principles of the general maritime law. Rather, the Court based its decision on selective examination of certain cases and statutes. It made no attempt to put the issues into a contemporary context. It is, therefore, reasonable to predict that *Miles* should have no effect on the recovery of pecuniary damages in maritime personal injury actions. Similarly, it should have no effect on those types of non-pecuniary damages, such as pain and suffering, that have long been accepted as appropriate in maritime cases.

In the aftermath of *Miles*, however, lower federal courts and state courts have had to deal with several specific questions:

1. Should a surviving dependent spouse be denied damages for loss of consortium?
2. Should loss of consortium be denied in actions based on the general maritime law for personal injuries not resulting in death?
3. Has the underlying basis for *Gaudet* been so undermined by the quest for uniformity that loss of consortium should now be denied in all actions under the general maritime law, including:
 - a. actions by seamen against non-employers;
 - b. actions involving non-seaman maritime workers such as longshoremen;
 - c. actions arising from injury or death of parties, such as passengers, who are not seamen or maritime workers?

Presently, there is no pre-ordained "right" answer to some of these questions; and the Supreme Court, in defining the reach of *Miles*, could go either way in answering the questions. In the lower courts, however, *Miles* has already had some impact. At one extreme, in denying recovery of punitive damages (an issue not addressed by the Supreme Court in *Miles*), the Sixth Circuit Court of Appeals has stated: "Although *Gaudet* has never been overruled, its holding has been limited over the years to the point that it is virtually meaningless."⁵⁴ At the other extreme, a district court within the Sixth Circuit, subsequently and with

54. *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1458 (6th Cir.), cert. denied, 114 S. Ct. 304 (1993).

full knowledge of this statement, concluded that "loss of consortium damages remain viable under the general maritime law, except as specifically held otherwise by *Miles*."⁵⁵ This part will review the impact of *Miles* on the lower federal and state courts.

B. *Dependent Spouses*

Perhaps the simplest question for the courts to resolve is whether damages for loss of consortium are recoverable in a wrongful death action brought by a dependent spouse. Some plaintiffs have argued *Miles* is not controlling on this issue because the plaintiff in *Miles* was a non-dependent parent.⁵⁶ This distinction was crucial and served as the basis for the decision of the court of appeals in *Miles* on the loss of consortium issue.⁵⁷ Prior to *Miles*, the dependent/non-dependent distinction was regarded by many courts as the critical factor in determining whether a parent could recover for loss of consortium.⁵⁸ However, those courts that have been asked to draw this distinction in claims by dependent spouses have rejected it on the ground that the Supreme Court in *Miles* drew no such distinction, but simply held loss of consortium is not an appropriate item of damages in wrongful death actions based on the death of a seaman.⁵⁹ In reaching this result, the *Miles* Court declined to follow the reasoning of the court below which had relied on the distinction to deny recovery.

C. *Personal Injuries Not Resulting in Death*

The courts have not had much difficulty determining whether the *Miles* preclusion of recovery for loss of consortium in the case of the death of a seaman also applies to a spouse's claim for loss of consortium against a seaman's employer in a personal injury case in which no death occurred. Seamen's suits against their employers frequently couple a Jones Act claim with a claim for unseaworthiness under the general maritime law. Every court of

55. *In re Cleveland Tankers, Inc.*, 843 F. Supp. 1157, 1159 (E.D. Mich. 1994).

56. *Haltom v. Lykes Bros. S.S. Co.*, 771 F. Supp. 179 (E.D. Tex. 1991); *Turley v. Co-Mar Offshore Marine Corp.*, 766 F. Supp. 501 (E.D. La. 1991).

57. *Miles v. Melrose*, 882 F.2d 976, 987 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317 (1990). This view, apparently, has been accepted by the courts as being the majority view in both non-maritime and maritime death cases. *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019, 106 S. Ct. 1205 (1986); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151 (S.D. Fla. 1992).

58. *See Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019, 106 S. Ct. 1205 (1986); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151 (S.D. Fla. 1992). *But see Haley v. Pan Am. World Airways, Inc.*, 746 F.2d 311 (5th Cir. 1984) (allowing the parents of an adult plane crash victim to collect for loss of love and companionship).

59. *Haltom v. Lykes Bros. S.S. Co.*, 771 F. Supp. 179 (E.D. Tex. 1991); *Turley v. Co-Mar Offshore Marine Corp.*, 766 F. Supp. 501 (E.D. La. 1991).

appeals and virtually every district court that has considered the consortium issue in personal injury cases has held that *Miles* also precludes recovery for loss of consortium in personal injury cases.⁶⁰ Some courts have relied heavily on the uniformity ground of *Miles*.⁶¹ Others have found that the rationale, in such cases prior to *Miles*, for allowing recovery has been eroded by *Miles* and, furthermore, that the reliance by *Miles* on congressional intent to preclude loss of consortium in actions under the Jones Act was equally applicable in personal injury cases under the general maritime law.⁶²

D. Seamen's Actions Against Non-Employer Defendants

A quite different question deals with the applicability of *Miles* to actions brought by seamen against non-employer defendants. In *Miles*, the Court placed great emphasis on the incongruity between recovery by seamen under the Jones Act, which has been held not to allow loss of consortium, and the *Gaudet* formula which does allow such damages, at least in the case of "longshoremen" (*Sieracki* seamen). To bring uniformity to seamen's actions, the Court in *Miles* made the preclusive Jones Act rule applicable in a seaman's unseaworthiness action against his employer as well. In suits against a non-employer shipowner or any other actor who is not the seaman's employer, the Jones Act is not applicable. The action is based exclusively on the general maritime law. Some courts have found that *Miles* is nevertheless controlling, usually on grounds of uniformity.⁶³ Other courts, however, have limited *Miles* to its facts and have held that, where a seaman's claim is against a non-employer defendant (hence not under the Jones Act) and is not brought under the DOHSA, the general maritime law continues to provide a remedy for loss of consortium. In such cases, not only is there no statutory bar, but there is no conflict with any

60. *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994); *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993); *Lollie v. Brown Marine Serv., Inc.*, 995 F.2d 1565 (11th Cir. 1993); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992); *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127 (5th Cir.), *cert. denied*, 113 S. Ct. 190 (1992); *Gray v. Texaco, Inc.*, 610 So. 2d 1090 (La. App. 3d Cir. 1992), *writ denied*, 616 So. 2d 687 (1993); *Phillips v. Water Towing, Inc.*, 620 So. 2d 1387 (La. App. 4th Cir.), *writ denied*, 629 So. 2d 1135 (1993).

61. *See, e.g.*, *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992).

62. *See* *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994); *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127 (5th Cir.), *cert. denied*, 113 S. Ct. 190 (1992); *Cater v. Placid Oil Co.*, 760 F. Supp. 568 (E.D. La. 1991).

63. *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426 (9th Cir. 1994); *Trident Marine v. M/V Atticos*, Nos. CIV.A. 93-1018, 93-1070, 93-3116, 1994 WL 682469 (E.D. La. Dec. 2, 1994); *Carnival Cruise Lines v. Red Fox Indus.*, 813 F. Supp. 1185 (E.D. La. 1993), *aff'd in part*, 18 F.3d 935 (5th Cir. 1994); *Ellender v. John E. Graham & Co.*, 821 F. Supp. 1136 (E.D. La. 1992); *Duplantis v. Texaco, Inc.*, 771 F. Supp. 787 (E.D. La. 1991); *Billot v. Lovell*, 633 So. 2d 280 (La. App. 1st Cir. 1993); *Trahan v. Texaco, Inc.*, 625 So. 2d 295 (La. App. 4th Cir. 1993). *Davis* involved a products liability suit against the manufacturer of a vessel. The court found the status of the defendant and its relationship with the plaintiff was not an important distinction. *Davis*, 27 F.3d at 430.

statutory provision.⁶⁴ This split of authorities is probably attributable to the manner in which the opinions of both the Supreme Court and the Fifth Circuit Court of Appeals discuss the liability of the various defendants.⁶⁵ The Supreme

64. *In re Cleveland Tankers, Inc.*, 843 F. Supp. 1157 (E.D. Mich. 1994); *Sugden v. Puget Sound Tug & Barge Co.*, 796 F. Supp. 455 (W.D. Wash. 1992); *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75 (E.D. La. 1991); *Verdin v. L&M Bo-Truc Rental, Inc.*, No. CIV.A. 88-0308, 1991 WL 194764 (E.D. La. Sept. 19, 1991), *aff'd*, 968 F.2d 17 (5th Cir. 1992). The *Rebstock* court stated that Jones Act status is irrelevant in an action against third parties. *Rebstock*, 764 F. Supp. at 75-76.

65. In *Miles*, the plaintiff sued numerous defendants, including Apex Marine Corporation and Westchester Shipping Company (identified as "the vessel operators"), Archon Marine (identified in the Supreme Court's opinion simply as "the charterer," but in the court of appeals' opinion as a "bare-boat" charterer), and Aeron Marine Company (referred to as the "owner" of the vessel). *Miles v. Apex Marine Corp.*, 498 U.S. 19, 21, 111 S. Ct. 317, 320 (1990). A bare-boat charter under certain circumstances may insulate the true owner from liability for unseaworthy conditions caused or otherwise attributable to the charterer. See, e.g., *Davis*, *supra* note 7, at 248. But see *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 183 n.12 (5th Cir. 1981). That would appear to be so when the unseaworthiness is based on some deficiency of the crew. In such cases the bare-boat charterer is treated as the owner *pro hac vice* and is liable for unseaworthy conditions which cause injury to a member of the crew. Ordinarily, the owner *pro hac vice* is considered an employer of the crew, but this depends on the circumstances and the terms of the charter party. It is not clear from the facts whether Apex and Westchester were the seaman's employer, whether they were merely agents for the "owner" and therefore not the seaman's employer, or whether all three were the seaman's employer. Furthermore, it is not clear whether the bare-boat charter was an arms-length transaction, which should have insulated the true owner, or whether the charterer was some alter ego of the owner. Finally, it is not clear whether the charterer took the master and crew of the owner notwithstanding the statement that the charter was a bare-boat charter. The court of appeals stated the plaintiff's decedent had been hired pursuant to a collective bargaining agreement between Apex and the seaman's union. But neither court analyzed the discrete theories of liability applicable to each defendant, and the Supreme Court lumped all of the defendants into a group it collectively referred to as "Apex," thus seeming to treat all the defendants as one. This grouping and the manner in which the Court worded its holding—"that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman," *Miles*, 498 U.S. at 33, 111 S. Ct. at 326—support an argument that the beneficiaries lost not only the right to recover loss of consortium in unseaworthiness actions from a seaman's vessel-owner-employer but also from all defendants against whom they assert a general maritime law claim. Conversely, it may be argued that because the Court relied heavily in its analysis on congressional intent in enacting the FELA, the Jones Act, and on its prior decisions as to the scope of damages in Jones Act cases, the Court merely wanted to create a uniform rule of damages in actions founded on the seaman-employer relationship. Perhaps it was in each of the *Miles* defendant's interest not to contest the issue whether it was a Jones Act employer, because as a Jones Act employer it had the best argument for denying liability for loss of consortium. This might explain why the issue was not discussed in either appellate decision. Nevertheless, the Supreme Court should have realized seamen sue tortfeasors other than their vessel-owner employers, and the Court could have made the scope of its decision clearer. In the meantime, the lower federal courts can only guess at whether the *Miles* preclusion of recovery for loss of consortium applies in suits by seamen or their beneficiaries against defendants other than employers. In fact, in *Mussa v. Cleveland Tankers*, 802 F. Supp. 88 (E.D. Mich. 1992), one of the defendants sought to support its argument that *Miles* applies across the board to any action by or derived through a seaman regardless of the defendant's status by placing before the court the pleadings in *Miles*. The defendant's purpose was to show that plaintiffs had sued non-employer defendants, and that such actions were included within the Supreme Court's holding in *Miles*. *Id.* at 89.

Court simply lumped together all of the defendants (the owner, operator, and charterer) and referred to them collectively as "Apex."⁶⁶ The Fifth Circuit focused on *Miles*' status as a non-dependent parent as the basis for denying recovery, thereby finding it unnecessary to discuss the status of the various defendants. The Supreme Court, however, relied heavily on the decedent's status as a Jones Act seaman. As discussed below, the Court should have realized that the status of the various defendants as either employers or non-employers could be an important factor.

E. Non-Seamen Plaintiffs

Another question raised in some cases is whether the Court's holding in *Miles* in regard to loss of consortium is applicable in cases in which the person who has been injured or killed is not a seaman. The Court's specific reference to the "death of a seaman"⁶⁷ may have led some courts to conclude the *Miles* rule is not applicable in cases involving a non-seaman.⁶⁸ Certainly, if the Court had intended to formulate a rule of general applicability it could have overruled *Gaudet* and indicated that recovery for loss of consortium is not available in any action brought under the general maritime law. It did not indicate, however, that it was overruling *Gaudet*. The following sections provide analyses of cases involving injury or death of maritime workers such as longshoremen and cases involving other persons.

66. *Miles*, 498 U.S. at 21, 111 S. Ct. at 320.

67. There are actually two holdings in regard to consortium, and in both the Court referred only to the death of a seaman. *Id.* at 37, 111 S. Ct. at 328.

68. *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994) (relying partially on *Miles* and holding in a product liability suit that a non-dependent parent of a child killed in a jet ski accident could recover neither for loss of consortium nor for the future earnings of the decedent). *But see Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 645 (3d Cir. 1994) (limiting *Miles*, in a wrongful death suit by the parents of a 12-year-old child killed in a recreational boating accident, to classes of plaintiffs specifically addressed by Congress, and holding that "whether loss of society, loss of support and services, future earnings or punitive damages are available for the death of a non-seaman in territorial waters is a question to be decided in accordance with state law").

This reasoning has also been followed in the Second Circuit in cases involving wrongful death suits and survival actions stemming from fatal airline accidents. In *In re Air Disaster at Lockerbie Scotland* on Dec. 21, 1988, 37 F.3d 804 (2d Cir. 1994), a case arising out of the air disaster over Lockerbie, Scotland, the court found *Miles* only limited the recovery of those plaintiffs restricted by statute (such as the Jones Act or the DOHSA) to pecuniary damages. Finding that the applicable statute, the Warsaw Convention, meant to provide for "full compensatory damages for any injuries or death covered by the Convention," the court held the measure of damages should be that allowed by the general maritime law principles, and not by more restrictive federal statutes. *Id.* at 829. *Accord Zicherman v. Korean Air Lines*, Nos. 542, 667, 93-7546, 93-7546, 1994 WL 685690 (2d Cir. Dec. 5, 1994) (involving the crash of an airplane into the Sea of Japan).

F. Actions by Maritime Workers

As to maritime workers, it should be noted that *Gaudet* involved an action by a longshoreman whose claim was grounded on unseaworthiness under the general maritime law. Congress has since abolished the longshoreman's action for unseaworthiness; the question, thus, is whether *Gaudet*'s holding has survived. Although *Gaudet* was based on unseaworthiness, longshoremen and other maritime workers may still bring actions for negligence under the general maritime law against persons who injure them. This right is preserved and modified in the LHWCA.⁶⁹ Thus, notwithstanding the absence of an unseaworthiness remedy under the general maritime law, an action for negligence still exists under the general maritime law. *Gaudet* held that damages recoverable under an unseaworthiness action included loss of consortium. If *Gaudet* survived *Miles*, then there is no reason why that remedy is not still available under a general maritime law negligence action. As stated above, the Supreme Court did not explicitly overrule *Gaudet*; although, with its concern for uniformity, it may have severely undermined it. Some lower courts have concluded *Gaudet* cannot be rationally applied in light of *Miles*.⁷⁰ In compelling analyses, these courts have noted that seamen have been a favored group in the courts.⁷¹ What

69. Section 905(b) of the 1972 Amendments to the LHWCA provides a cause of action for negligence to a maritime worker under the Act. Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 905(b) (1988). See also *Hall v. Hvide Hull No. 3*, 746 F.2d 294, 303 (5th Cir. 1984), cert. denied sub nom. *Avondale Shipyards, Inc. v. Rosetti*, 474 U.S. 820, 106 S. Ct. 69 (1985):

[T]he Congressional intent of the 1972 amendments to the Longshoremen's Act, including that provided by § 905(b), was to preserve within the federal admiralty jurisdiction the traditional maritime tort remedy of an Act-covered employee for injuries caused by the negligence of a vessel, broadly defined, while on the navigable waters.

70. Several judges in the Eastern District of Louisiana have so held. See, e.g., *Means v. Tidewater Grand Isle, Inc.*, No. CIV.A. 92-1589, 1993 WL 149073 (E.D. La. May 6, 1993); *Boudreaux v. Penrod Drilling Corp.*, No. CIV.A. 91-2660, 1993 WL 30344 (E.D. La. Jan. 23, 1993); *Hollie v. Consolidated Natural Gas Serv. Co.*, No. CIV.A. 91-0608, 1993 WL 22191 (E.D. La. Jan. 21, 1993). Each of these cases was decided before the Fifth Circuit decided *Randall v. Chevron, U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), which held to the contrary. Cf. *Robertson v. Arco Oil & Gas Co.*, 766 F. Supp. 535 (W.D. La.) (involving a plaintiff who was an oil and gas worker and who was injured on the continental shelf), *aff'd on other grounds*, 948 F.2d 132 (5th Cir. 1991). In *Smallwood v. American Trading & Transp. Co.*, 839 F. Supp. 1377, 1385 (N.D. Cal. 1993), the court, basing its analysis on the development of remedies for longshoremen "and the Supreme Court's clear language in *Miles*," held "that *Gaudet* damages are no longer recoverable by the survivors of longshore workers injured or killed in territorial waters." The court then concluded, based on its reading of the legislative history of the 1972 amendments to the LHWCA (in regard to compensation), that Congress intended to put longshoremen "on the same footing as land based employees" and that state law should determine damages recoverable under the Act. *Id.* The court allowed recovery for loss of consortium under California law. *Id.* So much for uniformity!

71. Seamen receive preferential treatment with regard to wages. See *Thielebeule v. M/S Nordsee Pilot*, 452 F.2d 1230, 1232 (2d Cir. 1971) ("Congress has looked with great favor upon [wage claim suits] . . . and has granted seamen preferential treatment over other litigants in admiralty." (citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 72 S. Ct. 1011 (1952))); *Cummings v.*

justification could there be for courts to extend greater rights to longshoremen than to seamen? If uniformity in damages is a driving force in the *Miles* decision, is uniformity not promoted by applying the *Miles* rule to all maritime personal injury and death cases? Some courts have so concluded.⁷² Others, including the Fifth Circuit Court of Appeals, have held that *Miles* has not overruled *Gaudet* and that damages for loss of consortium may be awarded where a longshoreman has been killed in territorial waters.⁷³ The Fifth Circuit, however, has also held that damages for loss of consortium may not be recovered where a longshoreman is injured outside of territorial waters.⁷⁴ *Gaudet* is controlling only with respect to injuries sustained by a longshoreman within territorial waters.

G. Actions by Persons Other Than Seamen and Maritime Workers

There is a split of authority as to whether damages for loss of consortium may be awarded in cases involving injury to or death of persons such as passengers who are neither seamen nor maritime workers. Some courts have interpreted the uniformity dimension of *Miles* as having eliminated recovery for loss of consortium in actions under the general maritime law regardless of the status of the parties.⁷⁵ For example, a panel of the Fifth Circuit Court of

Miller Time, 705 F. Supp. 62, 65 (D.P.R. 1988) ("Securing such a right to fishermen . . . follows from the special position seamen hold as wards of the admiralty court Fishermen and other seamen receive special treatment from the courts, including with regard to their wages."); Courts have treated seamen favorably in terms of a shipowner's duty to provide maintenance and cure. See *Shields v. United States*, 662 F. Supp. 187, 191 (M.D. Fla. 1987) ("The rule [for maintenance and cure] has been liberally applied in favor of the seaman."); *Oswalt v. Williamson Towing Co.*, 357 F. Supp. 304, 310 (N.D. Miss. 1973) ("Admiralty courts have been liberal in interpreting this duty [to provide for maintenance and cure] 'for the benefit and protection of seamen who are its wards.'" (quoting *Vaughan v. Atkinson*, 369 U.S. 527, 531-32, 82 S. Ct. 997, 1000 (1962) and *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528, 58 S. Ct. 651, 653 (1938))), *aff'd in part*, 488 F.2d 51 (5th Cir. 1974). Also, statutes have been liberally construed by the courts in favor of seamen. See *Zarrago v. Texas Co.*, 182 F. Supp. 589, 592 (E.D. Pa.) ("The libellants rely primarily upon the history of favored treatment to seamen in the construction of these statutes to support their contentions. This court agrees with the policy expressed in these cases" (citations omitted)), *aff'd*, 284 F.2d 657 (3d Cir. 1960). See also Hon. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. Mar. L. & Com. 249, 283-84 (1993).

72. See *supra* note 70.

73. *Randall v. Chevron, U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994). The court determined the LHWCA, which preserves a longshoreman's general maritime negligence action, does not limit recovery to pecuniary loss as the Jones Act and the DOHSA do. See also *Ferrara v. Fukuoka Senpaku, K.K.*, No. CIV.A. 88-346-S, 1991 WL 50040 (D. Mass. Apr. 3, 1991), which reached the same result.

74. *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994). And see *McKee v. Popich Bros. Water Transp., Inc.*, No. CIV.A. 93-3848, 1994 WL 382633 (E.D. La. July 19, 1984), which reached the same result for a roustabout injured outside of territorial waters.

75. *Newhouse v. United States*, 844 F. Supp. 1389 (D. Nev. 1994) (limiting passenger damages under *Moragne* to pecuniary losses).

Appeals has suggested that it would be inconsistent with *Miles* to allow recovery for loss of consortium in a death case arising from a collision on an inland waterway between plaintiff-decedent's bass boat and a crew boat operated by defendant. Neither the Jones Act nor unseaworthiness was involved.⁷⁶ The case was one of pure general maritime law negligence, but the court stated "[t]he Supreme Court has clearly indicated its desire to achieve uniformity of damage recoveries in the exercise of admiralty jurisdiction."⁷⁷ The court further stated that "with out [sic] expressly so deciding at this time, we acknowledge the strength of the argument that damages for loss of society may no longer be permitted in a general maritime wrongful death action involving the operator of a fishing boat."⁷⁸ In contrast, some courts have held that *Miles* does not extend to cases based on injury or death of a non-seaman. Recovery has been allowed in cases involving passengers,⁷⁹ and also in one case involving a swim-

76. *Walker v. Braus*, 995 F.2d 77 (5th Cir. 1993). Also see dictum in *Robertson v. Arco Oil & Gas Co.*, 766 F. Supp. 535, 539 (W.D. La.), *aff'd on other grounds*, 948 F.2d 132 (5th Cir. 1991), where the court said:

Thus, the same damages principles applicable to seamen bringing general maritime law claims . . . apply equally to longshoremen's actions under 905(b). As no other ability to recover loss of consortium damages in a general maritime tort action exists, the court can discern no reason to provide for such here. It must be remembered that the section 905(b) action is merely an action for maritime negligence, indistinguishable from *an action by passengers of or visitors on a ship*.

(emphasis added).

The Fifth Circuit further indicated it would apply *Miles* in a passenger situation in *Kelly v. Panama Canal Comm'n*, 26 F.3d 597 (5th Cir. 1994). In this case, suit was brought under the Panama Canal Act, 22 U.S.C. § 3772 (1988); however, in denying recovery for loss of consortium to the spouse of the decedent boat passenger, the court relied on maritime law and applied the *Miles* preclusive rule. The Ninth Circuit has applied *Miles* to preclude recovery for loss of consortium in the case of a passenger injured on the high seas. *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994).

77. *Walker*, 995 F.2d at 82.

78. *Id.* On remand, the district court denied recovery for loss of consortium on grounds of uniformity, and because it believed it would be "anomalous" to allow the beneficiaries of a non-seaman to recover damages which were denied to the beneficiaries of a seaman. *Walker v. Braus*, 861 F. Supp. 527, 535 (E.D. La. 1994). Compare *Randall v. Chevron, U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), which is the Fifth Circuit's decision with respect to longshoremen.

79. *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622 (3d Cir. 1994); *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994); *Emery v. Rock Island Boatyards, Inc.*, 847 F. Supp. 114 (C.D. Ill. 1994); *Powers v. Bayliner Marine Corp.*, 855 F. Supp. 199 (W.D. Mich. 1994). *Emery* involved the survivors of deceased pleasure boat passengers. See also *In re Air Disaster at Lockerbie Scotland* on Dec. 21, 1988, 37 F.3d 804 (2d Cir. 1994); *Zicherman v. Korean Air Lines, Nos. 542, 667, 93-7480, 93-7546*, 1994 WL 685690 (2d Cir. Dec. 5, 1994). The Sixth Circuit Court of Appeals has read *Miles* as not precluding recovery of loss of consortium in all general maritime cases, but following what appears to be the majority view has held that loss of consortium can be recovered only by dependent parents of a deceased non-seaman. *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990). The Second Circuit Court of Appeals has held, where the Jones Act and the DOHSA do not apply, a non-dependent parent may not recover loss of consortium for the death of a child. The "non-dependency" of the parent seems to have been a crucial factor because, even before the *Miles* decision, the clear weight of the case law denied loss of consortium to non-dependent parents. Although not expressly stated, the implication is such recovery would be allowed if the parent could show financial

mer.⁸⁰ These courts have emphasized that no statute is controlling in these situations and that, because non-seaman plaintiffs are not entitled to invoke the benefits of the Jones Act, these plaintiffs should not be subject to the Act's restrictions on damages.

H. Lost Future Wages in Survival Actions

The second issue addressed by the Court in *Miles* dealt with whether damages for future lost wages, that is, income the plaintiff's decedent would have earned if he had not been killed, may be recovered by his estate in a survival action. Again, the Court first considered a preliminary issue: whether it should create a survival action under the general maritime law, as some lower courts had done.⁸¹ The Court, however, declined to resolve the issue, preferring instead to hold that, even if it were to recognize such an action, recovery for future lost wages would not be recoverable. Initially, the Court pointed out that, in states which permit survival actions, the majority rule precludes recovery for future lost wages.⁸² But the Court felt itself foreclosed from considering, let alone adopting, the minority rule, even if it were inclined to do so: "We sail in occupied waters. Maritime tort law is now dominated by federal statute and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them."⁸³ The Court then observed that, at the time the Jones Act was enacted, the survival provision of the FELA had been interpreted as precluding recovery for loss of future wages and that this rule was equally applicable to the Jones Act. "Congress has limited the survival right for seamen's injuries resulting from negligence."⁸⁴ As with the loss of consortium issue, the Court was unwilling to provide a broader remedy under the general maritime law.

Also, questions again arise as to the consequences of the Court's decision on the "loss wages" issue. Does the exclusion of future lost wages from recovery in a survival action apply in suits brought against defendants other than the decedent seaman's employer where the Jones Act is inapplicable and

dependency. Otherwise, the distinction between dependent and non-dependent parents would be superfluous. *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994). *Accord Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151 (S.D. Fla. 1992). Both cases involved fatal jet ski accidents.

80. *Schumacher v. Cooper*, 850 F. Supp. 438 (D.S.C. 1994).

81. *Evich v. Morris*, 819 F.2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914, 108 S. Ct. 261 (1987); *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Spiller v. Thomas M. Lowe, Jr. & Assocs.*, 466 F.2d 903 (8th Cir. 1972).

82. The Court noted it was not bound by the majority rule and mentioned there were policy reasons that favored the minority rule, including the "special solicitude for the welfare of seamen and their families." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36, 111 S. Ct. 317, 327 (1990).

83. *Id.*

84. *Id.*, 111 S. Ct. at 328.

Congress cannot be said to have limited the seaman's remedy?⁸⁵ Does the exclusion of post-death lost wages from recovery in a survival action apply in cases involving non-seamen decedents such as maritime workers or passengers?⁸⁶ One may anticipate conflicts within the lower courts similar to those that have occurred with regard to the loss of consortium issue. In denying recovery to non-dependent parents whose son had died in a jet ski accident, the Second Circuit Court of Appeals remarked that the Supreme Court's holding on the lost wages issue was much broader than its holding on loss of consortium.⁸⁷ The court of appeals stated that, although the *Miles* Court "relied heavily upon the decedent's status as a seaman and the resultant applicability of the Jones Act, . . . the announced conclusion of its opinion (unlike the companion ruling on loss of society) was not confined to seamen."⁸⁸ However, that interpretation of the breadth of *Miles* on the lost wages issue may be reading the Court's concluding sentence both too literally and out of context, because almost everything else the Court said on the lost wages issue was in the context of the death of a seaman.⁸⁹

85. The Ninth Circuit has acknowledged that *Miles* overruled its previous holding that future lost wages of a seaman could be recovered in a general maritime law survival action. It has also held, in a case involving a seaman killed on the high seas, that the *Miles* rule precluding recovery of lost future wages was applicable even where suit is not based on the Jones Act and where the defendant is not the decedent's employer. As the court held in *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 430 (9th Cir. 1994): "*Miles* instructs the lower federal courts that a claim for lost future earnings is not available in connection with a maritime death for which Congress has already provided a remedy and has excluded such damages. The identity of the defendant is irrelevant to these considerations."

86. *Newhouse v. United States*, 844 F. Supp. 1389 (D. Nev. 1994) (relying on the expansive language of *Miles* and disallowing recovery for future economic loss for the death of a passenger); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993) (relying on the need for uniformity, the Jones Act, and the DOHSA and disallowing recovery for future lost wages for the death of a passenger and for loss of future enjoyment of life).

87. *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994).

88. *Id.* at 1093. *But see Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 639 n.31 (3d Cir. 1994):

[E]ven if there is a federal rule which extends beyond seamen . . . we doubt that the federal rule would extend to deny lost future earnings when the decedent was a child. . . .

We also doubt its applicability to cases where the decedent was an adult who, unlike a Jones Act seaman, was unemployed.

89. The Court framed the issue to be decided this way: "We must next decide whether, in a general maritime action surviving the death of a seaman, the estate can recover decedent's lost future earnings." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33, 111 S. Ct. 317, 326 (1990). Later, the Court said:

We will not create, under our admiralty powers, a remedy disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death. Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.

Id. at 36, 111 S. Ct. at 328.

I. Punitive Damages

In light of the current controversy over punitive damages throughout tort law, it should come as no surprise that the *Miles* decision has been cast into the fray notwithstanding that, not only did the Supreme Court not decide whether punitive damages are recoverable under the general maritime law, but the term "punitive damages" is never discussed in its opinion.⁹⁰ It should also come as no surprise that the lower federal courts are divided on the issue of whether punitive damages are recoverable under the general maritime law after *Miles*. The United States Courts of Appeals for the First⁹¹ and the Sixth⁹² Circuits have held that, under *Miles*, punitive damages may not be recovered in a claim under the general maritime law. Both cases involved injury to or death of a seaman.⁹³ Based upon *Miles*, two themes run through these decisions on punitive damages and those of district courts that have reached similar results—a desire for uniformity and deference to legislative determinations.⁹⁴ These courts

90. The Supreme Court, in summarizing the history of the *Miles* case in the lower courts, mentioned that a claim for punitive damages was dismissed by the trial court and affirmed by the court of appeals. *Id.* at 22-23, 111 S. Ct. at 320.

91. *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994).

92. *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993).

93. The Second Circuit Court of Appeals was faced with the issue in a case involving a non-seaman decedent, but resolved it by holding punitive damages could not be recovered by non-dependent parents. In passing, however, the court referred, with apparent approval, to lower federal court cases which, relying on *Miles*, disallowed punitive damages under the general maritime law "in order to further uniformity between that law and the analogous federal statutes." *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993) (citing *Boykin v. Bergesen D.Y. A/S*, 822 F. Supp. 324 (E.D. Va. 1993)), *cert. denied*, 114 S. Ct. 1060 (1994). See *Ortega v. Oceantrawl, Inc.*, 822 F. Supp. 621 (D. Alaska 1992); *In re Cleveland Tankers, Inc.*, 791 F. Supp. 679 (E.D. Mich. 1992). See also the cases cited in *CEH, Inc. v. FV "Seafarer"*, 148 F.R.D. 469 (D.R.I. 1993), *aff'd*, 153 F.R.D. 491 (D.R.I. 1994). *CEH, Inc.* did, however, allow a claim for punitive damages where no statutory claim had been made. The decision in that case was originally entered by a magistrate judge and was later affirmed by the district court.

94. In addition to the cases cited *supra* note 93, see *Ledet v. Power Offshore Servs.*, No. CIV.A. 93-4204, 1994 WL 150805 (E.D. La. Apr. 6, 1994) (disallowing punitive damages under general maritime personal injury law but allowing them for arbitrary and capricious failure to pay maintenance and cure); *Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992) (disallowing punitive damages under general maritime personal injury law but allowing them for willful refusal to pay maintenance and cure); *La Voie v. Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992) (holding *Miles* precludes punitive damages both on the unseaworthiness claim and the willful refusal to pay maintenance and cure); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991) (disallowing punitive damages for a pecuniary loss); *Bridgett v. Odeco, Inc.*, 646 So. 2d 1249 (La. App. 4th Cir. 1994) (holding, after *Miles*, punitive damages are not available under the general maritime law); *Gray v. Texaco, Inc.*, 610 So. 2d 1090 (La. App. 3d Cir. 1993) (holding *Miles* precludes recovery of punitive damages even for willful refusal to pay maintenance and cure), *writ denied*, 616 So. 2d 687 (1993). See also *Guillory v. C.F. Bean Corp.*, No. CIV.A. 93-2643, 1994 WL 150738 (E.D. La. Apr. 12, 1994); *Dopson v. Wilrig*, No. CIV.A. 92-4091, 1993 WL 192145 (E.D. La. June 1, 1993); *In re Waterman S.S. Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *In re*

have noted that the Jones Act incorporates the substantive provisions of the FELA and, as such, punitive damages are not recoverable in Jones Act cases.⁹⁵ Interspersed in the discussions is the suggestion that the FELA and the Jones Act allow only for the recovery of "pecuniary" losses, and that punitive damages are "non-pecuniary."⁹⁶ This analysis has led some courts to conclude that the general maritime law must respect the limits for recovery established by Congress and that courts should not create a right to recover damages that exceed the congressionally mandated limits.⁹⁷ These courts have remarked that the strong interest in uniformity in maritime law also supports this result. Almost all of the cases have involved seamen and their employers, but some have involved non-employer defendants.⁹⁸

As has occurred in post-*Miles* loss of consortium cases, defendants can be expected to use the reasoning in *Miles* to resist the claims for punitive damages asserted in cases involving non-seamen, to wit, if uniformity is important in harmonizing damages recoverable in seamen cases under the general maritime law with those recoverable under the Jones Act and the DOHSA, is it not equally important to harmonize the damages recoverable under the general maritime law in non-seamen cases with those recoverable in seamen cases? The general maritime law has shown special solicitude to seamen and their families. To treat non-seamen and their families more favorably than seamen and their families would be anomalous and contrary to the history and tradition of maritime law. Thus, there are logical arguments for extending the scope of *Miles*.

Other courts have rejected this approach and have concluded that *Miles* is not determinative of the punitive damages issue. In the most direct approach, some courts have simply found *Miles* not to be controlling because the punitive damages issue was not before the Court and was not discussed by the Court even

Aleutian Enter., Ltd., 777 F. Supp. 793 (W.D. Wash. 1991); Donaghey v. Ocean Drilling & Exploration Co., No. CIV.A. 90-0163, 1991 WL 129808 (E.D. La. July 10, 1991), *rev'd on other grounds*, 974 F.2d 646 (5th Cir. 1992); Haltom v. Lykes Bros. S.S. Co., 771 F. Supp. 179 (E.D. Tex. 1991); *In re The Mardoc*, 768 F. Supp. 595 (E.D. Mich. 1991); Penrod Drilling Corp. v. Williams, 868 S.W.2d 294 (Tex. 1993).

95. Decisions under the FELA have held punitive damages are not recoverable. *Kozar v. Chesapeake & O. Ry.*, 449 F.2d 1238 (6th Cir. 1971). Likewise, some courts have concluded no claim for punitive damages may be made under the Jones Act. *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984).

96. "In *Miles v. Apex Marine Corp.*, the Supreme Court held that non-pecuniary damages are not recoverable under General Maritime Law or the Jones Act. Punitive damages, by their nature, are non-pecuniary." *Bell v. Zapata Haynie Corp.*, 855 F. Supp. 152, 153 (W.D. La. 1994) (citation omitted).

97. To say that *Miles* should be strictly limited to its facts is to ignore the doctrinal underpinnings of the decision. *Miles* compels the conclusion that a plaintiff who is statutorily barred from receiving a punitive award cannot recover punitive damages by couching his claim in the judge-made general maritime law of negligence and unseaworthiness. *Anderson v. Texaco, Inc.*, 797 F. Supp. 531, 535 (E.D. La. 1992).

98. *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991) (involving a claim for punitive damages against employer and non-employer defendants).

in dictum. These courts, then, have relied on pre-*Miles* decisions which have allowed punitive damages in actions brought under the general maritime law.⁹⁹

J. Forecasting the Future—Part 1 Miles: What Could Have Been

As things stand, some courts have read *Miles* literally and have confined the decision to its facts: a Jones Act seaman's dependents cannot recover damages for loss of consortium from his Jones Act employer even in an action under the general maritime law; and, in calculating damages in survival actions, loss of future wages may not be included. On the other hand, what appears to be a majority of courts has pointed out that a fair reading of the *Miles*' opinion and, more particularly, a fair regard for the reasons given by the Court for reaching its conclusion, would compel the extension of the *Miles* restrictive approach to other damages issues which were not before the Court. The two doctrines which underlie the decision in *Miles* are uniformity and judicial deference to congressional mandate. Did these two doctrines compel the result in *Miles*, and do they necessitate the extension of *Miles* to matters not before the Court in that case? These important issues will be examined now.

99. *Duplantis v. Texaco, Inc.*, 771 F. Supp. 787 (E.D. La. 1991) (involving no Jones Act claim, but only a general maritime negligence claim against a non-employer). The *Duplantis* court relied on pre-*Miles* Fifth Circuit precedent in a personal injury case, *In re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981), and in the seminal case *The Amiable Nancy*, 16 U.S. (3 Wheat) 546 (1818), which was a non-personal injury collision case. See also *Powers v. Bayliner Marine Corp.*, 855 F. Supp. 199 (W.D. Mich. 1994) (allowing punitive damages in an action brought by a passenger); *CEH, Inc. v. FV "Seafarer"*, 148 F.R.D. 469 (D.R.I. 1993), *aff'd*, 153 F.R.D. 491 (D.R.I. 1994) (allowing punitive damages where no statutory claim has been asserted); *Kartofilis v. Louis Dreyfus Corp.*, No. CIV.A. 92-3397, 92-3352, 1993 WL 483576 (E.D. La. Nov. 17, 1993) (sustaining dismissal of punitive damages against the Jones Act employer but not against an allegedly negligent third party); *Mussa v. Cleveland Tankers*, 802 F. Supp. 88 (E.D. Mich. 1992) (allowing punitive damages from third party against whom no statutory claim had been asserted); *Hannon v. Waterman S.S. Corp.*, No. CIV.A. 80-1175, 1991 WL 278996 (E.D. La. Dec. 20, 1991) (involving Jones Act and general maritime claims against a Jones Act employer); *Davis v. Penrod Drilling Corp.*, No. CIV.A. 91-1458, 1991 WL 26451 (E.D. La. Dec. 2, 1991) (involving an unseaworthiness claim against a Jones Act employer); *Butler v. Zapata Haynie Corp.*, 633 So. 2d 1274 (La. App. 3d Cir. 1994) (involving Jones Act and unseaworthiness claims against an employer); *Strawder v. Zapata Haynie Corp.*, Nos. 94-453, 94-454, 1994 WL 597489 (La. App. 3d Cir. Nov. 2, 1994) (holding in a suit against a non-employer third party that *Miles* only restricts recovery of "compensatory" non-pecuniary damages, not "exemplary" remedies such as punitive damages); *Mistich v. Pipelines, Inc.*, 609 So. 2d 921 (La. App. 4th Cir. 1992) (allowing punitive damages in an unseaworthiness action against employer.). *Kartofilis* was decided by the same judge who decided *Duplantis*.

Similarly, in a post-*Miles* case concerning the availability of punitive damages for failure to pay maintenance and cure, the Fifth Circuit distinguished maintenance and cure from other remedies available to seamen (such as those under the DOHSA and the Jones Act) and found the "implications of *Miles* . . . are not so direct as to allow this panel to depart from the Court's previous decisions that punitive damages are available in maintenance and cure cases." *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279, 1284 (5th Cir. 1994), *reh'g en banc granted*, No. 92-4711 (Nov. 4, 1994). However, an appeal for rehearing *en banc* has been granted.

K. Uniformity

It is quite commonly observed that one of the goals of admiralty law is uniformity.¹⁰⁰ To the extent this has been achieved, it is one of the virtues of admiralty law. Persons engaged in interstate and international transportation should not have to be exposed to different rules as their vessels move from place to place. However, as has been observed elsewhere, uniformity is most important in commercial transactions because it enables business persons to plan and calculate the consequences of their actions.¹⁰¹ This is true not only in the matter of maritime transactions but also in the land-based law of contracts, negotiable instruments, etc. This quest for uniformity in the commercial world has prompted Congress and the states to adopt legislation such as the Carriage of Goods by Sea Act¹⁰² and the Uniform Commercial Code.¹⁰³

Be that as it may, one must recognize that maritime personal injury and death laws have always been characterized by substantial differences, often based upon such factors as the status of the parties.¹⁰⁴ As stated at the outset of this paper, only a seaman may bring an action for maintenance and cure and for unseaworthiness. Maritime workers and passengers may not bring such an action. A seaman may sue his employer for negligence, but a maritime worker ordinarily may not. The element of negligence under the Jones Act is different than that under the general maritime law. The element of causation is different under the Jones Act than it is under the general maritime law, such as in an unseaworthiness action. Although a longshoreman may sue a vessel owner for negligence, special rules have been formulated to define the vessel owner's duty of care. This lack of uniformity is not merely the product of judicial activity, but is often compelled by legislation such as the Jones Act and the LHWCA. Furthermore, these differences do not concern inconsequential details. One may express the view that whether a plaintiff may recover damages for loss of consortium is of considerably less significance than whether a plaintiff has a

100. See, e.g., Thomas J. Schoenbaum, 1 Admiralty and Maritime Law § 3-2, at 60 (2d ed. 1994).

101. Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1265-74 (1989).

102. 46 U.S.C. app. §§ 1300-1315 (1988). This statute is based on an international convention intended to promote uniformity.

103. In contrast, personal injury law is one area that has characteristically varied to some degree from state to state, and there has never been the same perceived need for uniformity in this area as there has been in the area of commercial law. See, e.g., Sturley, *supra* note 101.

104. See *supra* notes 1-29 and accompanying text. One recent Third Circuit case, *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622 (3d Cir. 1994), indicates the *Miles* nods in the direction of uniformity are somewhat disingenuous. Noting one trend in recent Supreme Court cases is "the weakness with which the principle of uniformity . . . has actually been applied," the court opined that "the concept of uniformity has a good deal less weight than has been thought," and that its significance lies only in "the extent that it aids in the 'vindication of federal policies.'" *Id.* at 636-37 (citations omitted). Furthermore, the court's interpretation of *Miles* led it to conclude status is not irrelevant in determining the availability of damages that "status does make a difference." *Id.*

cause of action at all. But if uniformity is so important as to require a denial of damages to a seaman's spouse for her loss of consortium, it would seem that an even more compelling argument can be made for harmonizing the basic rules of liability. Yet no such attempt is being undertaken. We should not, however, slavishly pursue the goal of uniformity in a narrow context. There are other important policy implications and historical factors that should be given consideration.

The policy of achieving uniformity can be viewed in different contexts. The *Miles* Court chose to view the uniformity goal only in the most narrow context of the damage components of various kinds of seamen's actions. There is another context in which the Court could have viewed damages. It could have examined the issue by looking at the contemporary law of tort damages, specifically recovery for loss of consortium as it presently exists in the United States. During the last twenty years, there has been a major change with respect to the recovery of damages for loss of consortium in American tort law.¹⁰⁵

As late as 1963, in *Igneri v. CIE. de Transports Oceaniques*,¹⁰⁶ the Second Circuit Court of Appeals was faced with the issue whether the wife of an injured longshoreman could recover damages for loss of her husband's consortium. The injuries occurred on a vessel in the harbor at Brooklyn, New York. At the time, New York law did not provide a wife with a right to recover damages for loss of consortium resulting from injuries to her husband. That New York law did not recognize such a claim, observed Judge Friendly, was not dispositive because maritime law was controlling. He also stated that, when there was no established rule of maritime law, "admiralty judges often look to the law prevailing on the land."¹⁰⁷ The court then noted that at common law, and until recently in the states, a wife had no right to recover damages for loss of consortium.

105. "In most jurisdictions today the loss of consortium action has been extended to a wife whose husband has been negligently injured." Pamela R. Bollweg, *Loss of Parental Consortium: An Argument in Favor of Recognition in South Dakota*, 38 S.D. L. Rev. 542, 542 (1993). See also Edward E. Gainor, *The Bucks Stop Here: Parents May Not Recover for Loss of Consortium of a Negligently Injured Child: Sizemore v. Smock*, 430 Mich. 283, 422 N.W.2d 666 (1988), 5 Cooley L. Rev. 811, 815 (1988) ("The wife's consortium action for negligent injury to the husband was first recognized in 1950 This is now clearly the majority rule."); Kevin Lindsey, *A More Equitable Approach to Loss of Spousal Consortium*, 75 Iowa L. Rev. 713, 713 (1990) ("Over time the nature of the action and the class of persons entitled to assert the claim changed considerably."); Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 Ariz. St. L.J. 1321, 1332-33 (1992) ("Today, the overwhelming number of jurisdictions allow both the husband and the wife to recover for loss of spousal consortium."). Finally, see Gregg A. Guthrie, Comment, *Should Pennsylvania Recognize a Cause of Action for Loss of Parental Consortium?*, 28 Duq. L. Rev. 697, 698 (1990):

Until comparatively recently, however, there was no similar action in favor of a wife when her husband was injured. It was not until 1950, in *Hitaffer v. Argonne, Co.*, that an American Court allowed a wife to recover for loss of consortium. Today, a majority of American Courts allow the loss of consortium claim to either spouse

106. 323 F.2d 257 (2d Cir. 1963).

107. *Id.* at 259 (emphasis added).

Furthermore, at the time of *Igneri*, only twelve American jurisdictions recognized a wife's right to recover for loss of her husband's consortium, and nineteen states that had reconsidered the issue since 1950 continued to reject it. In light of this conflict, with only a minority of states recognizing a wife's right to recover damages for loss of her husband's consortium, the court looked at the precedents in maritime law. It found only a few old cases in which a husband's claim for loss of his wife's consortium was in issue and none of these was considered as sufficiently authoritative. Judge Friendly then made the same FELA-Jones Act analysis later used in *Miles* and concluded that damages for loss of consortium were not recoverable in an action for injury or death of a seaman under the Jones Act. Likewise, a claim for loss of consortium under an unseaworthiness claim should be controlled by the result in a Jones Act negligence claim. There is nothing to indicate that the warranty of seaworthiness extends to third persons such as a wife, especially in view of the strict liability nature of the claim. The court could find no justification for giving more extensive damages in a strict liability claim than one based on fault.¹⁰⁸

It is important to note the *Igneri* decision viewed the loss of consortium issue in a very broad context. It looked not merely at the Jones Act and the few maritime precedents available but placed considerable emphasis on the fact that loss of consortium was not readily available to wives in the United States. Ten years after *Igneri*, the loss of consortium issue was considered by the Supreme Court in *Gaudet*. In reaching its conclusion to allow a wife to recover damages for loss of consortium in an action under the general maritime law, a majority of the Court relied on the fact that "[a] clear majority of States . . . have rejected such a narrow view of damages, and, either by express statutory provision or by judicial construction, permit recovery for loss of society."¹⁰⁹ In a footnote the majority opinion stated "that 27 of the 44 state and territorial wrongful-death statutes which measure damages by the loss sustained by the beneficiaries, permit recovery for loss of society."¹¹⁰ It is precisely this kind of data, relied on by the *Igneri* court to deny recovery in the 1960's and by the *Gaudet* Court to permit recovery in the 1970's, which is absent in *Miles*. In other words, both the *Igneri* and *Gaudet* courts seem to have recognized a need to reconcile the elements of damages recoverable in maritime personal injury cases with those recoverable in similar land-based cases. Why should maritime plaintiffs recover

108. Note, however, that in 1979 the New York Court of Appeals had to decide whether or not to follow *Igneri*. It refused to do so:

In our opinion, examination of the *ratio decidendi* of the *Igneri* decision reveals an erosion of its theoretical underpinnings so severe as to precipitate its collapse under its own weight. To begin with, unlike the state of the law of the land as to recovery for loss of consortium then prevailing, the great majority of States, including New York, now recognize such a cause of action by either husband or wife in a personal injury action.

Alvez v. American Export Lines, Inc., 389 N.E.2d 461, 463 (N.Y. 1979), *aff'd*, 446 U.S. 274, 100 S. Ct. 1673 (1980) (citing numerous authorities).

109. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 587, 94 S. Ct. 806, 816 (1974).

110. *Id.* at 588 n.21, 94 S. Ct. at 816 n.21.

less damages than persons injured on the land? Maritime law generally has been particularly solicitous to seamen and maritime workers and their families. There is certainly no basic principle of maritime law that is hostile to or which would be violated by allowing recovery for loss of consortium.

The Court in *Miles*, however, has laid the analytical framework for eliminating recovery of loss of consortium in all maritime cases, perhaps for eliminating the unseaworthiness action itself. Unless *Miles* is confined to its facts, it will have achieved the narrow objective of making maritime personal injury and death law uniform on the issue of loss of consortium, while retaining a lack of uniformity on other more important issues of maritime personal injury law. Furthermore, this result will have been achieved at the expense of creating a lack of uniformity between maritime tort law and land-based tort law. It is difficult to find any compelling difference between torts committed on water and those committed on land that justifies disparate treatment of recovery of damages for loss of consortium. The Court's decision in *Miles*, especially if it is extended to all maritime personal injury actions and to other elements of damages, such as punitive damages, can be expected to encourage forum shopping, as plaintiffs' counsel now have an added incentive to narrow their "views" of admiralty tort jurisdiction and to seek remedies under state tort law.

If the *Miles* Court had considered the current status of recovery for loss of consortium in the United States, it would have found that virtually every state allows a wife to recover damages for loss of consortium for the injury¹¹¹

111. Alabama: *Swartz v. United States Steel Corp.*, 304 So. 2d 881 (Ala. 1974); Alaska: *Schreiner v. Fruit*, 519 P.2d 462 (Alaska 1974); Arizona: *City of Glendale v. Bradshaw*, 503 P.2d 803 (Ariz. 1972); Arkansas: *Missouri Pac. Transp. Co. v. V.W. Miller*, 299 S.W.2d 41 (Ark. 1957); Colorado: *Crouch v. West*, 477 P.2d 805 (Colo. Ct. App. 1970); Connecticut: *Hopson v. St. Mary's Hosp.*, 408 A.2d 260 (Conn. 1979); Delaware: *Stenta v. Leblang*, 185 A.2d 759 (Del. 1962); Florida: *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971); Georgia: *Aretz v. United States*, 456 F. Supp. 397 (S.D. Ga. 1978); Hawaii: *Lealaimatafao v. Woodward-Clyde Consultants*, 867 P.2d 220 (Haw. 1994); Illinois: *Dini v. Naiditch*, 170 N.E.2d 881 (Ill. 1960); Indiana: *England v. Dana Corp.*, 428 F.2d 385 (7th Cir. 1970); Iowa: *Acuff v. Schmit*, 78 N.W.2d 480 (Iowa 1956); Kentucky: *Lloyd v. Lloyd*, 479 S.W.2d 623 (Ky. 1972); Maine: *McKellar v. Clark Equip. Co.*, 472 A.2d 411 (Me. 1984); Massachusetts: *Diaz v. Eli Lilly & Co.*, 302 N.E.2d 555 (Mass. 1973); Minnesota: *Dawydowycz v. Quady*, 220 N.W.2d 478 (Minn. 1974); Mississippi: *Tribble v. Gregory*, 288 So. 2d 13 (Miss. 1974); Missouri: *Novak v. Kansas City Transit, Inc.*, 365 S.W.2d 539 (Mo. 1963); Montana: *Duffy v. Lipsman-Fulkerson & Co.*, 200 F. Supp. 71 (D. Mont. 1961); Nebraska: *Guyton v. Solomon Dehydrating Co.*, 302 F.2d 283 (8th Cir. 1962); Nevada: *General Elec. Co. v. Bush*, 498 P.2d 366 (Nev. 1972); New Hampshire: *Siciliano v. Capitol City Shows, Inc.*, 475 A.2d 19 (N.H. 1984); New Jersey: *Ekalo v. Constructive Serv. Corp. of Am.*, 215 A.2d 1 (N.J. 1965); New Mexico: *Roseberry v. Starkovich*, 387 P.2d 321 (N.M. 1963); New York: *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897 (N.Y. 1968); North Carolina: *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 266 S.E.2d 818 (N.C. 1980); North Dakota: *Hastings v. James River Aerie No. 2337—Fraternal Order of Eagles*, 246 N.W.2d 747 (N.D. 1976); Ohio: *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230 (Ohio 1970); Oklahoma: *Duncan v. General Motors Corp.*, 499 F.2d 835 (10th Cir. 1974); Oregon: *Roe v. Pierce*, 832 P.2d 1226 (Or. 1992); Pennsylvania: *Hopkins v. Blanco*, 320 A.2d 139 (Pa. 1974); Rhode Island: *Mariani v. Nanni*, 185 A.2d 119 (R.I. 1962); South Carolina: *Berry v. Myrick*, 194 S.E.2d 240 (S.C. 1973); South Dakota: *Hoekstra v. Helgeland*, 98 N.W.2d 669

and the death¹¹² of her husband. The Court would have found that the trend in recent years has been to expand the right to recover damages for loss of society to include not only wives and children¹¹³, but also

(S.D. 1959); Tennessee: *Kilbourne v. Hanzelik*, 648 S.W.2d 932 (Tenn. 1983); Texas: *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978); Vermont: *Hay v. Medical Ctr. Hosp.*, 496 A.2d 939 (Vt. 1985); Washington: *Lundgren v. Whitney's, Inc.*, 614 P.2d 1272 (Wash. 1980); West Virginia: *King v. Bittinger*, 231 S.E.2d 239 (W. Va. 1976); Wisconsin: *Victorson v. Milwaukee & Suburban Transp. Co.*, 234 N.W.2d 332 (Wis. 1975); Wyoming: *Weaver v. Mitchell*, 715 P.2d 1361 (Wyo. 1986); District of Columbia: *Romer v. District of Columbia*, 449 A.2d 1097 (D.C. 1982); Puerto Rico: *Gonzalez v. Fireman's Fund Ins. Co.*, 385 F. Supp. 140 (D.P.R. 1974); Guam: *Duenas v. Yama's Co.*, No. CIV. 90-00062A, No. S.C. Civ., No. CV0718-89, 1991 WL 255834 (D. Guam App. Div. Nov. 18, 1991), *aff'd*, 999 F.2d 542 (9th Cir. 1993); Virgin Islands: *Benjamin v. Cleburne Truck & Body Sales, Inc.*, 424 F. Supp. 1294 (D.V.I. 1976).

112. Alabama: *Swartz v. United States Steel Corp.*, 304 So. 2d 881 (Ala. 1974); Alaska: Alaska Stat. § 09.55.580(c)(4) (1994); Arizona: *Howard Frank M.D., P.C. v. Superior Court*, 722 P.2d 955 (Ariz. 1986); Arkansas: *Jefferson Hosp. Ass'n v. Garrett*, 804 S.W.2d 711 (Ark. 1991); California: *Pesce v. Summa Corp.*, 54 Cal. App. 3d 86 (Cal. Ct. App. 1975); Colorado: *MacMaster v. Coontz*, 623 P.2d 71 (Colo. Ct. App. 1981); Connecticut: Conn. Gen. Stat. Ann. §§ 52-555(a) to -555(b) (West 1991); Florida: *Ryter v. Brennan*, 291 So. 2d 55 (Fla. Dist. Ct. App. 1974); Georgia: *Aretz v. United States*, 456 F. Supp. 397 (S.D. Ga. 1978); Hawaii: Haw. Rev. Stat. Ann. § 663-3 (1988); Illinois: *Pfeifer v. Canyon Constr. Co.*, 628 N.E.2d 746 (Ill. App. Ct. 1993); Indiana: *Dearborn Fabricating & Eng'g Corp. v. Wickham*, 551 N.E.2d 1135 (Ind. 1990); Iowa: *Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R.*, 335 N.W.2d 148 (Iowa 1983); Kansas: Kan. Stat. Ann. § 60-1904 (1983); Kentucky: *Lloyd v. Lloyd*, 479 S.W.2d 623 (Ky. 1972); Louisiana: La. Civ. Code art. 2315.1; Maine: *Phillips v. Eastern Me. Medical Ctr.*, 565 A.2d 306 (Me. 1989); Maryland: Md. Code Ann., Cts. & Jud. Proc. § 3-904 (1989); Massachusetts: Mass. Gen. Laws Ann. ch. 229, § 2 (West 1994); Hallett v. Town of Wrentham, 499 N.E.2d 1189 (Mass. 1986); Michigan: Mich. Comp. Laws Ann. § 600.2922 (West 1986); Minnesota: *Roers v. Engebretson*, 479 N.W.2d 422 (Minn. Ct. App. 1992); Missouri: Mo. Ann. Stat. § 537.090 (Vernon 1988); Montana: *Swanson v. Champion Int'l Corp.*, 646 P.2d 1166 (Mont. 1982); Nebraska: *Anson v. Fletcher*, 220 N.W.2d 371 (Neb. 1974); Nevada: *Nationwide Mut. Ins. Co. v. Moya*, 837 P.2d 426 (Nev. 1992); New Jersey: *Sykes v. Propane Power Corp.*, 541 A.2d 271 (N.J. Super. Ct. App. Div. 1988); New Mexico: *Romero v. Byers*, 872 P.2d 840 (N.M. 1994); New York: *Ciaccio v. Housman*, 412 N.Y.S.2d 557 (N.Y. Sup. Ct. 1979); North Carolina: *Keys v. Duke Univ.*, 435 S.E.2d 820 (N.C. Ct. App. 1993); North Dakota: *Hopkins v. McBane*, 427 N.W.2d 85 (N.D. 1988); Ohio: Ohio Rev. Code Ann. § 2125.02 (Baldwin 1994); Oklahoma: *Littlefield v. State Farm Fire & Casualty Co.*, 857 P.2d 65 (Okla. 1993); Oregon: *Roe v. Pierce*, 832 P.2d 1226 (Or. 1992); Pennsylvania: *Bonavitacola v. Cluver*, 619 A.2d 1363 (Pa. Super. Ct. 1993); Rhode Island: *Cobe v. Hersey*, 576 A.2d 1226 (R.I. 1990); South Carolina: S.C. Code Ann. § 15-75-20 (Law. Co-op. 1991); Tennessee: *Kilbourne v. Hanzelik*, 648 S.W.2d 932 (Tenn. 1983); Texas: *Missouri Pac. R.R. v. Dawson*, 662 S.W.2d 740 (Tex. Ct. App. 1983); Vermont: *Clymer v. Webster*, 596 A.2d 905 (Vt. 1991); Virginia: *Basham v. Terry*, 102 S.E.2d 285 (Va. 1958); Washington: *Christie v. Maxwell*, 696 P.2d 1256 (Wash. Ct. App.), *review denied*, 104 Wash. 2d 1002 (1985); West Virginia: *Belcher v. Goins*, 400 S.E.2d 830 (W. Va. 1990); Wisconsin: *Jaeger v. Raymark Indus., Inc.*, 610 F. Supp. 784 (E.D. Wis. 1985); Wyoming: *Weaver v. Mitchell*, 715 P.2d 1361 (Wyo. 1986); District of Columbia: *Romer v. District of Columbia*, 449 A.2d 1097 (D.C. 1982); Puerto Rico: *LaForest v. Autoridad de Las Fuentes Fluviales de P.R.*, 536 F.2d 443 (1st Cir. 1976).

113. See the cases *supra* notes 111-112. See also the following cases, which deal exclusively with recovery by children: Alaska: *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991 (Alaska 1987); Arizona: *Villareal v. State Dep't of Transp.*, 774 P.2d 213 (Ariz. 1989); Iowa: *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981), *overruled on other grounds by Audubon-Exira Ready Mix, Inc.*

parents.¹¹⁴ In other words, while the states have been swimming up the consortium stream, the Supreme Court in *Miles* elected to go in the opposite direction. Interestingly, the Court did look to the current view in the United States on the future lost wages issue, and it used the prevailing view to buttress its conclusion that such lost wages are not recoverable in a survival action.¹¹⁵ It is curious that the Court was willing to give some weight to the clear majority view when that view supported its conclusion, but it disregarded entirely the near unanimous view when it was contrary to its conclusion.

The Court, if it wants to limit the scope of *Miles* to its facts, as some lower courts have done, may yet defer to the current dominant rule in the United States. This could be done by emphasizing the importance of the Jones Act in its analysis in *Miles*. Restricting *Miles* to suits by seamen against their employers would give deference to the Jones Act and still permit damages in other maritime cases to conform to the general rule in the United States today. The Supreme Court could even restrict its ruling in *Miles* to death cases.

L. The Congressional Mandate?

Why did the *Miles* Court not adopt the modern American approach, which allows recovery for loss of consortium? The Court never even mentioned that possibility because it believed that option was foreclosed by legislation. It stated:

We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may

v. Illinois Cent. G.R.R., 335 N.W.2d 148 (Iowa 1983); Louisiana: Higley v. Kramer, 581 So. 2d 273 (La. App. 1st Cir.), writ denied, 583 So. 2d 483 (1991); Massachusetts: Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980); Michigan: Berger v. Weber, 303 N.W.2d 424 (Mich. 1981); Montana: Pence v. Fox, 813 P.2d 429 (Mont. 1991); Oklahoma: Williams v. Hook, 804 P.2d 1131 (Okla. 1990); Texas: Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990); Vermont: Hay v. Medical Ctr. Hosp., 496 A.2d 939 (Vt. 1985); Washington: Ueland v. Reynolds Metals Co., 691 P.2d 190 (Wash. 1984); West Virginia: Belcher v. Goins, 400 S.E.2d 830 (W. Va. 1990); Wisconsin: Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984); Wyoming: Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171 (Wyo. 1990).

114. Although not many states have recently re-examined the right of parents to recover loss of consortium damages for the death of infant children, the following states do allow such recovery: Arizona: Reben v. Ely, 705 P.2d 1360 (Ariz. Ct. App. 1985); Colorado: Miller v. Subia, 514 P.2d 79 (Colo. Ct. App. 1973); Florida: Yordon v. Savage, 279 So. 2d 844 (Fla. 1973); Hawaii: Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Idaho: Hayward v. Yost, 242 P.2d 971 (Idaho 1952); Illinois: Bullard v. Barnes, 468 N.E.2d 1228 (Ill. 1984); Ohio: Norvell v. Cuyahoga County Hosp., 463 N.E.2d 111 (Ohio Ct. App. 1983); Washington: Lockhart v. Besel, 426 P.2d 605 (Wash. 1967); Wisconsin: Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975).

115. "We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States . . ." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36, 111 S. Ct. 317, 328 (1990).

supplement these statutory remedies . . . but we must also keep strictly within the *limits* imposed by Congress.¹¹⁶

Later, in a similar vein, the Court said with respect to lost wages:

We sail in occupied waters. Maritime tort law is now *dominated* by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed.¹¹⁷

Admiralty lawyers and others familiar with maritime personal injury law may find the statements quoted above to be quite extraordinary. Maritime tort law is not *dominated* by statutes. True, Congress has enacted some very important statutes. The DOHSA provides a wrongful death remedy for specified beneficiaries of persons killed on the high seas by the wrongful conduct of another. It provides for the recovery of "pecuniary" loss, and it adopts the general maritime law rule in which contributory negligence mitigates the amount of damages that can be recovered. The DOHSA, however, does not specify the wrongful conduct—the elements of torts, such as negligence or products liability—which support such an action. The DOHSA does not specify the rules of causation or the effect of assumption of risk in such cases. All of those rules are part of the general maritime law developed by the courts. Furthermore, several lower federal courts have created a survival action to complement the DOHSA. The DOHSA does not deal with persons who have been injured but not killed on the high seas. In regard to maritime workers such as longshoremen, Congress has provided a worker's compensation remedy and denied these employees the right to sue under the Jones Act or for unseaworthiness. But Congress has also preserved the judicially created rights of these employees to sue for vessel negligence and to bring tort actions against third parties. In the context of tort litigation, the rights of maritime workers are primarily dependent on the rules of the general maritime law.

As to seamen, Congress did not create the right to maintenance and cure; it did not create the right to sue a vessel owner for unseaworthiness. These rights were created by the courts. It did enact the Jones Act which, either by creating a new right or by removing the obstacles to the traditional negligence action or by both, enables seamen to sue their employers for negligence. Congress, however, left the courts with the duty of making the rules. The rights of injured passengers are determined under the general maritime law. The rights applicable to deaths within territorial waters regardless of status (except for a negligence action in the case of a deceased seaman) are all controlled by the general maritime law, as are cases involving injuries on the high seas not resulting in

116. *Id.* at 27, 111 S. Ct. at 323 (emphasis added).

117. *Id.* at 36, 111 S. Ct. at 327-28 (emphasis added).

death. To state that "[m]aritime tort law is dominated by federal statute" is not merely an exaggeration, it is simply inaccurate. Although Congress has enacted important legislation affecting maritime torts, most of those statutes are bare-bones statutes. The development of the body of personal injury law has largely been left to the courts. It has been their duty to put meat on these statutory bones and to adopt rules under the general maritime law.

Besides reviewing what Congress has done in the maritime tort area, one must also examine what Congress has not done. In contrast with the legislative overruling of decisions that had given longshoremen the benefits of the Jones Act and the warranty of seaworthiness, Congress likewise chose not to overrule either *Moragne*, in its 1972 amendments to the LHWCA, or *Gaudet*, in its 1984 amendments to the LHWCA. In Section 905(b) of the LHWCA, Congress has confirmed the general maritime law right of a longshoreman to sue for injuries caused by vessel negligence and, presumably, to pursue the remedies created by the courts, including loss of consortium. One must assume that Congress, when it amended the LHWCA, was aware of the *Moragne*, *Gaudet*, and *Alvez* decisions and that recovery for loss of society has been available in the general maritime law negligence and unseaworthiness actions.

M. The FELA and the Jones Act

It is submitted that the *Miles* Court was not compelled by either the FELA or the Jones Act to preclude the recovery of damages for loss of consortium. Neither statute expressly excludes loss of consortium as a recoverable item of damage. Neither statute specifically enumerates the various items of damage which may be recovered. Thus, neither statute, even by implication, excludes recovery for loss of consortium. Loss of consortium has been excluded from recovery of damages under both statutes not because of what Congress has said in the statutes, but, as will be shown, because of what the courts have said about the statutes.

At the time of the enactment of the FELA and the Jones Act, what were the concerns of those who promoted the legislation and the concerns of the Congress which enacted it? The overriding goals were to promote the safety of employees and to provide a viable remedy to vulnerable employees engaged in high-risk occupations in interstate and foreign commerce who were injured or killed in work-related accidents and who were not adequately protected under state law.¹¹⁸ Congress had two options: it could have created an exclusive remedy in the form of a workers' compensation scheme, or it could have removed the barriers erected by the courts which made it all but impossible for a worker to recover damages from his employer in a civil action based on negligence. In enacting the FELA and the Jones Act, Congress implemented the latter (for

118. See, e.g., Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 160-66 (1953).

reasons not relevant to this article). The important objectives were to provide a remedy for injured workers who suffered work-related injuries and to provide a remedy for their families in the event that they were killed. This legislation concerned lost wages and medical expenses. For reasons which will be explained, no one was concerned with or considered a remedy for loss of consortium.

It is important to recall that, at the time these statutes were enacted, wives had no claim for loss of consortium for injury or death of their husbands under either the common law or the general rules of tort law applicable in all of the states. Statutes extending such a right simply did not exist. *Husbands did have a common-law right to recover damages for loss of consortium for injury to their wives, but wives had no comparable right.*¹¹⁹ It should also be remembered that, at the time the FELA and the Jones Act were enacted, almost all railroad workers and seamen were men. No concern was given in these statutes to a husband's common-law claim for loss of his wife's consortium because the demographics of the workplace made it unthinkable that a man would ever have an opportunity to assert such a claim for consortium. No concern was given to a wife's consortium claim for injury to or death of her husband because wives had no such claim at common law, and it was not that shortcoming of the common law on which Congress had focused. It is likely that Congress never gave a moment's thought to the matter of consortium. In the context of creating a cause of action for personal injuries sustained by male employees under the FELA and the Jones Act, it is inconceivable that Congress contemplated changing the common-law rule on consortium. Furthermore, with regard to personal injury, both statutes provide a cause of action for "employees" against their "employers" for injuries sustained in the course of employment. Obviously, a wife seeking loss of consortium damages for injury to her husband is not an employee, and she did not sustain "her injury" during the course of "her

119. It has been stated that at common law a husband had a claim "for damages to his marital interest, that is, for loss of the services and earnings of the wife, interference with his enjoyment of her society, and for the expense, past and prospective, of treatment of the injury, and any added burden of support." 1 Charles T. McCormick, *Handbook on the Law of Damages* § 92, at 330 (1935). Furthermore:

When the wife by reason of her injury, has become totally or partially incapacitated from furnishing her husband the customary wifely society and companionship, this loss, past and prospective, is likewise an element of damage in the husband's cause of action against the wrongdoer at common law. This interest in the wife's society is frequently called "consortium," though the term, traditionally included also the services and assistance of the wife already mentioned. The husband's interest in his wife's companionship is not a pecuniary one, nor can any direct evidence as to its value be furnished, and the jury must be left a large discretion in determining the sum to be allowed.

Id. at 332.

Also, "[i]n case of injury to the husband, no corresponding action lies for the wife's loss of her husband's society." *Id.* at 333.

employment." Therefore her loss of consortium is not literally included within the statute.¹²⁰

Another historical fact must also be considered. The FELA and the Jones Act not only changed the law on employers' liability for negligence, but they also changed tort law by creating wrongful death and survival actions. It is beyond dispute that the wrongful death action creates a right in beneficiaries of an employee killed in a work-related accident.¹²¹ It is also beyond dispute that the right is measured by the beneficiary's loss.¹²² Thus, the language of the wrongful death provision does not foreclose recovery for loss of consortium. The Supreme Court, however, in its 1912 decision in *Michigan Central Railroad v. Vreeland*,¹²³ held that recovery for wrongful death under the FELA was restricted to "pecuniary loss," and that damages for loss of consortium, *inter alia*, could not be recovered under the Act. The Court relied heavily on both the interpretation given by the English courts of similar language in Lord Campbell's Act (the first wrongful death statute enacted to modify the common law) and the interpretation by various state courts of their wrongful death statutes (which were based on the English statute).

The earlier cases quite properly concluded that, in enacting the FELA and the Jones Act, Congress did not contemplate departure from the then prevailing rules on damages, both as to personal injuries and death. But that is not the end of the matter. As will be shown, although the FELA and the Jones Act are not comprehensive, they have been interpreted by the courts to embrace a certain dynamic. These statutes do not spell out all of the details of workers' claims. It is clear that the claims are based on negligence, except in certain circumstances in which fault is presumed. It is also clear that specified common-law defenses do not defeat these claims but give rise to comparative fault, except under certain circumstances in which diminution of damages is not available to defendants. But that is, more or less, all that the statutes contain. The courts have viewed the statutes as having created common-law-like rights in certain workers for which courts must develop both the parameters and details of those rights. Neither the FELA nor the Jones Act have been regarded as frozen in the early twentieth century. With few exceptions, under these statutes, plaintiff

120. When Congress, by the Jones Act . . . gave a seaman the right to recover for personal injury caused by the employer's negligence, it did not authorize recovery by the seaman's wife for loss of consortium. As to non-fatal injuries this is plain from the language of the statute, which authorizes only the seaman himself (not his wife) to "maintain an action for damages at law." And it is established also that the damages recoverable by a seaman's widow suing for wrongful death under the Jones act do not include recovery for loss of consortium.

Igneri v. CIE. de Transps. Oceaniques, 323 F.2d 257, 266 (2d Cir. 1963) (citations omitted).

121. *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 68, 33 S. Ct. 192, 195 (1913) ("The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death.").

122. *Id.*

123. 227 U.S. 59, 33 S. Ct. 192 (1913).

workers' rights have grown as the rights of plaintiffs have grown under the tort law in this country.¹²⁴ Therefore, it is no more correct to say that, because Congress never considered the issue of loss of consortium, recovery must be precluded than it would be to say that, because Congress never considered post-traumatic stress syndrome or inflation, recovery must likewise be precluded. Likewise, in its interpretation of the term "seamen" in the Jones Act, the Court has not deemed itself foreclosed from including persons whose duties are quite remote from the duties performed by seamen in 1920.¹²⁵

In addition to *Vreeland*, another FELA case bearing on damages involved a claim by the father of a deceased minor railroad worker for "expenses incurred for medical expenses and the loss of the latter's services."¹²⁶ The action had been brought in state court which allowed recovery on the ground "that the right of action asserted by the father existed at common law and was not later taken away by the Federal Employers' Liability Act."¹²⁷ The Supreme Court reversed on the authority of two cases, neither of which involved loss of services of a minor child. Rather both held state remedies could not be used to supplement the FELA. The FELA was the exclusive remedy. The *Tonsellito* Court concluded: "Congress having declared when, how far, and to whom

124. See, e.g., *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2412 (1994) (Souter, J., concurring) ("[T]he Court's duty . . . in interpreting FELA . . . is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law."); *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 568, 107 S. Ct. 1410, 1417 (1987) ("[We assume] that FELA jurisprudence gleans guidance from common-law developments" (citing *Urie v. Thompson*, 337 U.S. 163, 174, 69 S. Ct. 1018, 1026 (1949))); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 547-48, 103 S. Ct. 2541, 2555-56 (1983) (allowing adjustment of award, under the LHWCA, for inflation, in accordance with the general federal common law); *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 398 (1958) ("Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers."); *Marchica v. Long Island R.R.*, 31 F.3d 1197, 1202-06 (2d Cir. 1994) (stating that common-law cases delineate the bounds of FELA recovery), *cert. denied*, 115 S. Ct. 727 (1995); *Brown v. CSX Transp., Inc.*, 18 F.3d 245, 249 (4th Cir. 1994) ("FELA does not define negligence and therefore leaves the question to be determined by common law principles as established and applied by the federal courts."); *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1167 (3d Cir. 1992) (Nygaard, J., concurring) ("The development of FELA, like common law principles, should proceed on a case by case, statute by statute basis to reflect changing conditions and values."); *Wilson v. Zapata Offshore Co.*, 939 F.2d 260, 265-66 (5th Cir. 1991) (holding, without reaching the issue "whether a purely emotional injury would be cognizable under the Jones Act," that sexual harassment (in the form of unwanted physical contact), together with the physical effects of emotional distress, created a claim under the Jones Act); *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 340 (1st Cir. 1980) (citing *Kernan*); *Wilson v. Consolidated Rail Corp.*, 810 F. Supp. 411, 415 (N.D.N.Y. 1993) (citing *Buell*); *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073, 1087 (E.D. Pa. 1989) ("[I]t is far more fruitful to view FELA as a living, growing document than a fossilized one."). See also *infra* notes 143-145, 153-155 and accompanying text.

125. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 111 S. Ct. 807 (1991). The Court in *Wilander* cited with approval *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), in which the Fifth Circuit held a member of a drilling crew on a mobile drilling platform could be a seaman.

126. *New York Cent. & H.R.R.R. v. Tonsellito*, 244 U.S. 360, 37 S. Ct. 620 (1917).

127. *Id.* at 361, 37 S. Ct. at 621.

carriers are liable on account of accidents in the specified class, such liability can neither be extended nor abridged by *common or statutory laws of the state*.¹²⁸ The Court's opinion was less than two pages long. This case dealt with whether the common law or statutory law of a state could supplement the FELA, and there was absolutely no analysis, in the court's opinion, as to whether the father could recover for loss of his deceased minor son's "services" under the FELA, as was permitted at common law.

Judicial decisions applying and interpreting the FELA, from its enactment until approximately 1939, must be read in a particular context. The reaction of the courts to the FELA must be considered in evaluating the degree of deference which should be paid to early decisions under the act. Congress, in enacting the FELA and companion railroad safety regulation, manifested two overriding purposes: (1) providing greater safety for employees in the operation of railroads, and (2) shifting the financial "burden of loss resulting from these casualties from 'those least able to bear it' to those [railroads] who are better able to bear those losses."¹²⁹ One commentator, after noting that the original FELA had been declared unconstitutional,¹³⁰ characterized the implementation of the congressional purposes by the courts as follows:

These expressed purposes of Congress and the policy thus announced did not meet with a friendly reception by the courts. After adoption of the 1910 amendment, the Employers' Liability Act ran the rapids of streams of restrictive interpretations and of constructions placed upon its provisions by the courts which reimposed many of the old common-law defenses, that, in the original Act, it was the intention of Congress to abolish. *The Act was so battered and damaged at the hands of the courts by 1939 that further rehabilitation and repair by Congress became essential.* The 1939 amendments repaired the damage to the Act's provisions that had resulted from its turbulent passage through the courts. The amendments made the purpose of Congress in passing the law in the first place so clear and positive as to leave no reasonable loophole for further innovation by the courts.

The Supreme Court of the United States, in an impressive series of decisions rendered subsequent to the 1939 amendment and under the unmistakable authority of its provisions, has written what may be accepted as the brightest page in the long struggle of operative railroad men to achieve justice and an equal position of bargaining power with the then powerful employers in securing adequate safeguards to life and limb and adequate compensation for wrongful injury and death in the course of their highly hazardous employment.¹³¹

128. *Id.* at 362, 37 S. Ct. at 621 (emphasis added).

129. Griffith, *supra* note 118, at 167-68.

130. *The Employer's Liability Cases*, 207 U.S. 463, 28 S. Ct. 141 (1908).

131. Griffith, *supra* note 118, at 168 (emphasis added). Support for this commentator's

This author agrees that there has been a substantially different emphasis and tone in the pre- and post-1939 Supreme Court decisions involving the FELA. Prior to *Miles*, the emphasis in the post-1939 decisions had been on the remedial nature of the legislation which was to be liberally construed in favor of injured workers and their beneficiaries.

N. *Pecuniary Loss*

One basis for denying recovery for loss of consortium in FELA and Jones Act actions is that these statutes permit recovery only for pecuniary loss or, stated in the negative, that these statutes do not permit recovery for non-pecuniary loss.¹³² The use of the terms "pecuniary loss" and "non-pecuniary loss" has unfortunately induced some courts to dismiss some types of claims for damages without much analysis. The truth of the matter is that neither the FELA nor the Jones Act has been applied to exclude all types of non-pecuniary damages. In actions for personal injury, the injured employee may recover for his pain and suffering¹³³ under both the FELA and the Jones Act. Even the *Miles* Court acknowledged that damages for pain and suffering experienced by

evaluation of the pre- and post-1939 decisions involving the FELA is supported by the views of the general counsel for one of the railroads. He found the early decisions of the Supreme Court to have been sound and true to the legislation, but that decisions handed down by the "'Roosevelt packed court' abrogated the established FELA rules which essentially were based on the common law rules of negligence." Force, *supra* note 11, at 4 (characterizing the views expressed in Sidney S. Alderman, *What the New Supreme Court Has Done to the Old Law of Negligence*, 18 *Law & Contemp. Probs.* 110 (1953)). Mr. Alderman was vice-president and general counsel for the Southern Railway Co.

132. *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 68, 33 S. Ct. 192, 195 (1913).

133. If "pecuniary damages" are defined as "those which can be measured with reasonable accuracy in terms of money," Howard L. Oleck, *Damages to Persons and Property* § 48, at 32 (1961), then it must be conceded that pain and suffering do not meet that definition. Pain and suffering are too subjective. As one commentator has noted:

Pain and suffering are perhaps the only elements of the damage award which are not related directly or indirectly to an arithmetical base. Other elements, such as impairment of earning capacity or medical expenses, are to a greater or lesser degree, fastened to specific figures which may be used as a guide in determining fair and reasonable compensation. There is no such equivalence between pain and suffering and dollars and cents. The difficulty is increased by the fact that there is no common experience for use by the jury in evaluating how much pain the plaintiff has suffered or is presently suffering.

1 Jacob A. Stein, *Personal Injury Damages* 16 (2d ed. 1991).

As stated by another commentator:

Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable. Rules devised for measuring pecuniary losses do not fit here.

McCormick, *supra* note 119, at 318.

The latter commentator also states: "The law furnishes no fixed measure or rule." *Id.* at 318 n.21.

a decedent prior to his death are recoverable in a Jones Act survival action brought by his estate. Also, the Court in *Vreeland* opined that, upon proper proof, a child whose parent has been killed may recover damages for loss of guidance, care, and advice.¹³⁴ As applied by later courts, this standard for recovery of these damages does not require proof of the value of these "services."¹³⁵

Thus, it is incorrect to say that all non-pecuniary damages are not recoverable under the FELA and the Jones Act. It is more accurate to say that certain non-pecuniary injuries are compensable under the FELA and the Jones Act and that other non-pecuniary injuries are not. Why was such a distinction made? The distinction was made as early as 1852 in *Blake v. The Midland Railway Co.*,¹³⁶ the seminal case denying recovery for loss of consortium under Lord Campbell's Act. In *Blake*, Justice Coleridge stated:

When an action is brought by an individual for personal wrong, the jury in assessing the damages, can with little difficulty award him a solatium for his mental sufferings alone, with an indemnity for his pecuniary loss. There may be a calculation of the pecuniary loss by the different members of the family from the death of one of them: but, if the jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise being given to the ruin of defendants. We must recollect that the Act we are construing applies not only to great railway companies but to little tradesmen who send out a cart and horse with an apprentice.¹³⁷

In this case, in which Lord Campbell himself was a member of the court, the court made it clear that damages for certain non-pecuniary losses, such as loss of consortium, were too speculative because of the difficulties in instructing

134. The court stated the husband's "care and advice" may have financial value and be included within the pecuniary loss which may be recovered if properly pleaded and supported by proper proof. *Vreeland*, 227 U.S. at 73, 33 S. Ct. at 197.

135. See *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 584, 94 S. Ct. 806, 815 (1974). See also *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 497, 100 S. Ct. 755, 759 (1980). Another example of the permissible recovery of non-pecuniary loss is found in death actions where McCormick, in his 1935 treatise on damages, states that:

While damages for loss of society of the husband and father and for the sorrow of the wife and children are thus excluded by most courts, the courts are not so materialistic as to limit compensation entirely to the loss of purely tangible contributions of money, property, shelter, and food. The evidence may show that the father would have bestowed upon his children care and attention directed towards training them in mind, morals, and body for life's tasks. This training has practical and financial value, however, difficult to estimate in money, and, if proven, is allowed.

McCormick, *supra* note 119, at 350-51.

136. 118 Eng. Rep. 35 (1852).

137. *Id.* at 41-42.

the jury on the measure of damages. The court was also concerned that this element of damages might be too diverting, because it could open the door to all kinds of evidence about the relationship between husband and wife and between parent and children. Finally, there was an apprehension that the damages for loss of consortium could be both unfair, because defendants would be treated differently depending on the number of children, and too burdensome on defendants, so that where a father left behind a large number of children the amount of damages could be ruinous. The court made much of the fact that this wrongful death statute was not restricted to wealthy defendants, such as large railways, but to the ordinary tradesman as well. It was, after all, a general wrongful death statute.

Lord Campbell's Act was the model for the original wrongful death statutes in the United States, and it was only natural for American courts to accept the judicial gloss put on that statute by the English courts in cases such as *Blake*. Almost all American courts follow this interpretation of the newly enacted wrongful death statutes and continue to apply it in FELA and Jones Act cases despite the fact that some courts have recognized neither statute bars recovery of all "non-pecuniary" damages. In *Cook v. Ross Island Sand & Gravel Co.*,¹³⁸ the court of appeals stated:

Yet, while the Jones Act arguably may apply a pecuniary loss restriction to the personal losses of a decedent's beneficiaries, the Act does not apply a pecuniary loss restriction to the injuries of a decedent himself. On the contrary, a decedent's beneficiaries are able to recover damages for any type of injury or loss which the decedent sustained during the time he was conscious prior to his death. Section 59 of the FELA, which is incorporated into the Jones Act provides that "[a]ny right of action given by this chapter to a person suffering injury shall survive to his or her personal representative. . . ." Courts have never interpreted this provision to require the bifurcation of the conscious pain and suffering of a decedent or a claimant into categories of "pecuniary loss" versus "nonpecuniary loss," or into categories of "physical injury" versus "mental and emotional injury." . . .

This policy of allowing damages for a *decedent's* pain and anguish, but of excluding damages for the mental pain and anguish of a decedent's beneficiaries is a policy that is based on sound reasoning. In essence, the mental pain and suffering of a decedent's *beneficiaries* is the emotional response of the beneficiaries to ". . . the harrowing experience resulting from the death of a loved one." Such suffering, although often real and intense, is generally obscure and speculative from an evidentiary point of view. In contrast, the mental pain and anguish that is experienced by a decedent generally involves discernible factual elements (e.g., loss of hearing, asphyxiation, impotency), and

138. 626 F.2d 746 (9th Cir. 1980).

thus a factfinder is able to make a reasonably accurate assessment of the injury which the decedent sustained.¹³⁹

Thus, for a court simply to state that, under the FELA and the Jones Act, only pecuniary damages may be recovered is simply not accurate. It is submitted that if damages for loss of consortium are to be denied, it must be because of some policy relating to their speculative nature, or because of an unwillingness to delve too deeply into family relationships, or because of a desire to avoid unfairness or undue burden to defendants. The court in *Blake* relied on all of these reasons.¹⁴⁰ Yet, in contrast to the English view, which is still generally hostile to recovery for loss of consortium in both death and personal injury cases,¹⁴¹ in virtually every state in the United States, a wife may recover damages for loss of consortium. In contrast to the court's statement in *Cook v. Ross Island Sand & Gravel Co.*, it would be more accurate to characterize the prevailing rule in this country as standing for the proposition that such damages are not too "obscure and speculative from an evidentiary point of view," but are such as would enable a fact-finder "to make a reasonably accurate assessment of the injury which the [beneficiary] sustained." In other words, all of the reservations expressed originally by the court in *Blake* in construing Lord Campbell's Act,¹⁴² and later accepted by the Supreme Court in its FELA and Jones Act cases, have been repudiated by the general acceptance of allowing recovery for loss of consortium in the states. Not only may wives and children recover for loss of consortium in almost all of the states, but the trend in this country has been to expand recovery for non-pecuniary damages.¹⁴³ These are the factors that influenced the Court in *Gaudet* to allow recovery for loss of consortium in actions under the general maritime law. That Court simply incorporated the prevailing rule on loss of consortium into the general maritime law. Recovery for loss of consortium has been the law under the general maritime law since *Gaudet* with apparently no ill effects. It is also significant

139. *Id.* at 749 (citation omitted) (footnotes omitted). Note how the court links pain and suffering to physical injury. But see the discussion of *Consolidated Rail Corp. v. Goushall*, *infra* notes 153-158 and accompanying text, in which the Supreme Court sustained an action for negligent infliction of emotional distress even in the absence of an accompanying physical injury.

140. See *supra* text accompanying notes 136-138.

141. The Fatal Accidents Act of 1976 has been interpreted in the following manner: "Damages cannot be recovered as a compassionate allowance or solatium to the dependents for their mental anguish or loss of society caused by the death." 34 Halsbury's Laws of England para. 94 (4th Ed. 1980) (footnotes omitted) (citing *Percy v. Brown*, 108 Sol. J. 219 (1964) and *Regan v. Williamson*, 2 All E.R. 241 (1976)).

"The right of a husband to damages for loss of *consortium* against a person who negligently injures his wife is an anomaly . . . and should not be extended to a wife in the case of a tort depriving her of the *consortium* of her husband." 27 (1) The Digest: Annotated British, Commonwealth and European Cases ¶ 1253 (1988).

142. *Blake v. The Midland Ry.*, 118 Eng. Rep. 35, 41-42 (1852). These reservations include the difficulty in assessing damages, introduction of evidence of family relations, and unfairness.

143. See *supra* notes 105, 111-112 and accompanying text.

that, unlike Lord Campbell's Act, which applies to the tradesman as well as the railway, the FELA and the Jones Act apply only to railroads and shipping companies.¹⁴⁴ One also should observe that, by making loss of consortium available as a recoverable item of damages in wrongful death and personal injury cases, the states have also made it applicable to the tradesman and everyone else.

Thus, the Court could have reached a different result in *Miles* without doing violence to any legislatively established rule. As stated earlier, neither the Jones Act nor the FELA, expressly or by implication, precludes recovery for loss of consortium. The Court in *Miles* could have done one of two things: it could have reiterated its conclusion in *Gaudet* and continued to allow recovery for loss of consortium under the general maritime law as a supplement to the Jones Act; or, preferably, it could have re-examined its earlier decisions on loss of consortium under the FELA and the Jones Act and concluded they were no longer viable in the context of the contemporary law of consortium in the United States. These two statutes historically have been given a liberal interpretation in favor of railroad and maritime workers.¹⁴⁵ Congress, when it enacted these statutes without enumerating the damages recoverable, must have intended to authorize the award of damages under the then prevailing rules relating to damages in personal injury and death cases. If the rules on damages currently prevailing have been changed to allow greater recovery to an injured person and his family, is there any reason to believe that Congress would not have expected the courts to apply those rules in FELA and Jones Act cases?

Congress, in enacting the FELA and the Jones Act, provided railroad workers and seamen with a common-law negligence action¹⁴⁶ on very favorable terms by eliminating the "killer" defenses of contributory negligence,¹⁴⁷ assumption of risk,¹⁴⁸ and the fellow servant doctrine.¹⁴⁹ Congress must have been aware that the law of negligence was not fixed or static. There is no reason to believe Congress would expect the courts to deny to railroad workers and seamen remedies available to virtually all other plaintiffs in personal injury and death cases.¹⁵⁰ The

144. See *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2412 (1994) (Ginsburg, J., dissenting).

145. See *Urie v. Thompson*, 337 U.S. 163, 180, 69 S. Ct. 1018, 1030 (1949) (referring to the "breadth of statutory language, the Act's humanitarian purposes, [and] its accepted standard of liberal construction to accomplish those goals" of the FELA); *Brister v. A.W.I., Inc.*, 946 F.2d 350, 354 (5th Cir. 1991) ("[T]he Jones Act generally provides for a broad basis for liability. In addition, the Jones Act contains a liberal causation requirement. If the defendant's negligence played any part, however small, in producing the seaman's injury, it results in liability.").

146. See *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 568, 107 S. Ct. 1410, 1417 (1987) (holding that FELA jurisprudence gleans its guidance from common-law developments).

147. See *supra* note 1.

148. See *supra* note 1.

149. See *supra* note 1. See also *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2404 (1994) ("In order to further FELA's humanitarian purposes, Congress did away with several common law tort defenses that had effectively barred recovery by injured workers. Specifically, the statute abolished the fellow servant rule . . .").

150. See *supra* text accompanying notes 104, 129, 145, 147, and *infra* text accompanying notes

Miles Court would only have had to conclude that it should no longer follow the English lead because the law generally applicable in personal injury and death cases in the United States had become so different from English law, which still refuses to recognize the right of a wife to recover damages for loss of consortium,¹⁵¹ and under which even the common-law right of a husband to recover has been criticized.¹⁵² In other words, the Court could have allowed the current situation and trends in the United States to inform its view, thereby enabling it to conclude that allowing recovery for loss of consortium in the 1990's is not inconsistent with Congress' goals in the first thirty years of the twentieth century.

O. Statutory Construction of the FELA and the Jones Act

The mechanical approach to statutory construction and the diminished role of the judiciary in FELA and Jones Act cases, as articulated in the opinion for the unanimous *Miles* Court, appears to be at odds with the Supreme Court's most recent attempt to reconcile these statutes with contemporary developments in tort law in this country. The United States Supreme Court recently addressed the subject of statutory interpretation of the FELA.¹⁵³ At issue was whether the FELA permitted recovery for negligently inflicted emotional distress, and, if so, what limitations should be placed on the right to recover—that is, under what circumstances should a plaintiff be permitted to recover? The Court was divided in constructing a framework for interpretation. The context for this difference of view was the formulation of the specific test for delimiting recovery for emotional distress. The majority opinion, in criticizing the court below, stated:

By treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on "meritorious" FELA claims, the Third Circuit put the cart before the horse: the common law must inform the availability of a right to recover under FELA for negligently inflicted emotional distress, so the "merit" of a FELA claim of this type cannot be ascertained without reference to the common law.¹⁵⁴

The Court noted that, at the time the FELA was enacted, the common law recognized recovery for negligently inflicted emotional distress. The Court then considered the tests for recovery at that time and those that have since been developed under state tort law. It did not adopt the most liberal and most recently formulated test used by the court below, but instead adopted a test that was still, at best, very much a minority view at the time the FELA was enacted. There is no

154 and 156.

151. See *supra* text accompanying notes 140-141.

152. *Id.*

153. Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994).

154. *Id.* at 2408.

doubt that the methodology of the majority opinion places considerable weight on the state of the common law at the time of the enactment of the statute. Yet, there is also no doubt that the Court did not believe that it was "mandated" to adopt the prevailing test at the time of the enactment of the statute.

The dissenting opinion criticized the majority's lack of precision as to the exact weight to be given to the common law in existence at the time of the enactment of the FELA because the majority did not clarify whether the common law at the time of enactment or the current state of the common law was the decisive factor.¹⁵⁵ It is indisputable, though, that the majority did not believe it was bound to follow the common-law view which was the majority view when the FELA was enacted; and it did not, ultimately, adopt that view. That the common-law majority view had generally been repudiated and had virtually no support in the states led the Court to reject it. The Court did not regard the common law in existence at the time the FELA was enacted as frozen into that statute. Further, it did not regard its hands as being tied by those common-law rules in effect in the early 1900's. The Court's approach reveals that it has an active role in interpreting the FELA and should not follow a mechanical approach to that Act.

If the *Miles* Court had used the approach articulated in the majority opinion described above, it should have reached a different conclusion on the loss of consortium issue. The current state of the law clearly and overwhelmingly favors recovery for loss of consortium. Under the common law in existence at the time the FELA was enacted, loss of consortium was compensable in a common-law tort action brought by a husband for *injuries* to his wife. Although it is true that recovery was not allowed in a suit brought by a wife for injuries to her husband, it is inconceivable that the common-law discrimination against women would be acceptable to the Court today. The FELA is a remedial statute; and, because women can now recover for loss of their husband's consortium in every state where consortium damages are allowed, it would be appropriate to extend to the wife the right to recover such damages for injury to her husband. In the interest of uniformity, the right to recover for loss of consortium could also be extended to wrongful death actions as it has in the vast majority of states.

155. The Court offers three justifications for its adoption of the "zone of danger" test. First the Court suggests that the "zone" test is most firmly rooted in "the common law." The court mentions that several jurisdictions had adopted the zone of danger test by 1908 and that the test is "currently followed in 14 American jurisdictions." But that very exposition tells us that the "zone" test never held sway in a majority of States.

Moreover, the Court never decides firmly on the point of reference, present, or historical, from which to evaluate the relative support the different common-law rules have enjoyed. If the Court regarded as decisive the degree of support a rule currently enjoys among state courts, the Court would allow bystander recovery, permitted in some form in "nearly half the States." If, on the other hand, the Court decided that historical support carried the day, then the impact rule preferred by most jurisdictions in 1908 would be the Court's choice.

Id. at 2417 (Ginsburg, J., dissenting) (citations omitted).

The same result is much easier to reach under the approach articulated in Justice Souter's concurring opinion. Although he joined in the Court's holding, he wrote:

separately to make explicit what I believe the Court's duty to be in interpreting FELA. That duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law. As we have explained:

[I]nstead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers . . . and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers.¹⁵⁶

The dissenting opinion also quoted some of the same language from *Kernan* and stressed the remedial purposes of the Act and the liberal construction applied to it by the courts.¹⁵⁷ Thus, under the approaches to statutory construction in FELA cases used in the concurring and dissenting opinions, the liberal objectives of the FELA-Jones Act legislation would best be served by giving railroad workers and seamen recovery in no smaller amount than is generally recovered in land-based tort actions in most states. The only way that recovery of loss of consortium would be denied to anyone, except a husband, would be if the Court adopted an approach to interpreting the FELA and the Jones Act which froze the elements of damages to those that were available under the common law at the time of their enactment. This approach is not only inconsistent with the liberal purposes underlying the legislation, but it is inconsistent with the methodology used by the Court in interpreting both statutes.¹⁵⁸

P. Two Further Observations

1. Inconsistency in the Court's Approach to Maritime Personal Injuries

It is difficult to reconcile the Court's decision in *Miles* precluding recovery for loss of consortium with its statement in *Miles* acknowledging the existence

156. *Id.* at 2412 (Souter, J., concurring) (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 398 (1958)).

157. *Id.* at 2413 (Ginsburg, J., dissenting).

158. *Id.* at 2413-14 (Ginsburg, J., dissenting) (citing *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 568-70, 107 S. Ct. 1410, 1417-18 (1987)).

of a remedy for seamen under the general maritime law for injury or death caused by unseaworthy conditions.¹⁵⁹ It is difficult to understand how the former (a remedy) is restricted by the Jones Act and the latter (a right of action) is not. In the Jones Act, Congress gave to seamen a right of action against their employers based on *fault*, that is, "negligence." Under the general maritime law, the Supreme Court has given to seamen a right of action based upon strict liability. Therein lies a danger in the Court's analysis because, it may be argued, if a seaman's rights are restricted to those expressed in the Jones Act and those judicial decisions interpreting the Jones Act, it seems that much of what the Court has done in the area of creating the unseaworthiness remedy must suffer the same fate as loss of consortium. Insofar as Congress created a right of action based on negligence with nary a word about unseaworthiness, could it not be argued that Congress overruled not only *The Osceola's* statements that had negated a seaman's right to recover for negligence, but also the statements whereby the Court had created a seaman's right to recover for unseaworthiness?¹⁶⁰ If the Jones Act controls the right of a seaman to recover damages for personal injuries and the right of his survivors to recover in case of his death, both rights predicated on a showing of employer negligence,¹⁶¹ then how can

159. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29, 111 S. Ct. 317, 324 (1990).

160. If it be answered the Jones Act claim is against the seaman's employer, and the general maritime law unseaworthiness claim is against the vessel owner, then why should that distinction not be equally controlling on the issue of damages? The Jones Act does not expressly overrule the unseaworthiness holding in *The Osceola*, but it does not purport to preserve it either. Furthermore, the Supreme Court has said the FELA is exclusive and controls the right of a railroad worker or his beneficiaries to recover from his employer. If the rights of seamen were totally driven by the Jones Act via the FELA, then serious doubts could be expressed with regard to the viability of the unseaworthiness action. The Jones Act, however, has never been completely driven by the FELA, and seaman's remedies have never been completely circumscribed by the Jones Act. The actions for maintenance and cure and unseaworthiness survived the enactment of the Jones Act and, until *Miles*, have had an independent existence. The reason for this lies in the nature of the general maritime law in the United States. The development of the general maritime law under Article III of the Constitution is unique and has no counterpart in the sources of law relating to the activities of railroads. Thus, the lock step reasoning that loss of consortium is not available in FELA actions, hence not available in Jones Act cases, and the inevitable conclusion that it is not thus available in actions created under the general maritime law simply ignores the history and role of the courts in fashioning rights and remedies under the general maritime law. This shortcoming in the *Miles*' decision is discussed later.

161. In *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2404 (1994), the majority of the Court said:

That FELA is to be liberally construed, however, does not mean that it is a workers' compensation statute. We have insisted that FELA "does not make the employer the insurer of the safety of his employees while they are on duty. The basis of liability is his negligence, not the fact that injuries occur." And while "[w]hat constitutes negligence for the statute's purposes is a federal question" we have made clear that this federal question generally turns on principles of common law: "the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." Those qualifications . . . are the modification or abrogation of several common-law defenses to liability, including contributory

a judicially created right based on strict liability also exist when the employer is also the vessel owner, as is often the case? The Court is inconsistent in its use of legislation as a constricting, higher authority. To eliminate or minimize this inconsistency, the Court must find a way of limiting *Miles*, unless it wants its decision on a relatively minor aspect of personal injury and death law to spill over into more significant issues.

2. *Renunciation of the Courts Constitutional Role in Admiralty Cases*

A second observation relates to the relationship between the Jones Act and the FELA. In its early Jones Act cases, the Court simply applied its decisions in FELA cases to actions brought under the Jones Act. This approach is logical and is supported by the language of the Jones Act. Yet while resort to decisions under the FELA may be appropriate in most instances, it should be noted that the rights of seamen, as developed under the general maritime law, have never been as narrow as the rights of railroad employees. Under the general maritime law, seamen have the right to recover maintenance and cure and may bring an action in strict liability for unseaworthiness. Conversely, railroad employees must prove negligence to recover damages and may rely on strict liability only upon proof of a violation of a safety statute or regulation. This difference is not merely one of degree. It indicates that there is a significant difference in the role of the federal judiciary in handling railroad cases under the FELA and its role in handling maritime personal injury cases under Article III of the Constitution.¹⁶²

Prior to the enactment of the FELA, a federal court could entertain the claim of an injured railroad worker only under its diversity of citizenship jurisdiction, and the worker's right to recover was based on state law. The federal courts had not assumed the responsibility for fashioning a federal common-law remedy for such workers, nor did they have any constitutional authority to do so. Prior to the enactment of the Jones Act, the federal courts, under Article III of the Constitution, had created remedies for injured seamen in the form of maintenance and cure and for injuries caused by an unseaworthy vessel. In enacting the Jones Act, Congress supplemented these judicially created remedies. The Court has never taken the position that, in enacting the Jones Act, Congress intended to preempt the judicially created remedies. In fact, the Court has held to the contrary, and injured seamen may invoke both the Jones Act statutory remedy and the judicially created remedies in a single action.¹⁶³ In the development

negligence and assumption of risk.
(quoting *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653, 67 S. Ct. 598, 600 (1947) and *Urie v. Thompson*, 337 U.S. 163, 174, 182, 69 S. Ct. 1018, 1027, 1030-31 (1949)) (citations omitted).

162. U.S. Const. art. III, § 2, cl. 1.

163. The Jones Act does not preclude a remedy for unseaworthiness or maintenance and cure. See *Brister v. A.W.I., Inc.*, 946 F.2d 350, 361 (5th Cir. 1991) ("A maintenance and cure claim typically accompanies other claims, such as the Jones Act and unseaworthiness claims. . . . [A]n award for maintenance and cure is independent of these other sources of recovery.").

of a body of admiralty and maritime law, the courts and Congress have operated as partners. This is true not only in the area of maritime personal injuries, but in other areas as well.¹⁶⁴ It is not suggested that Congress and courts are equal partners in this venture, an issue which need not be explored here, but it is undeniable that, through its power to formulate rules of the general maritime law, the Court has been more of a law *creator* than it has been in other areas of law over which it exercises jurisdiction.¹⁶⁵ The judiciary has shown its willingness to develop the admiralty and maritime law so as to fulfill its responsibility under Article III of the Constitution, barring an outright conflict with a Congressional statute.¹⁶⁶ Furthermore, Congress appears to have accepted this as an appropri-

164. The Harter Act, 46 U.S.C. app. §§ 190-196 (1988), the Carriage of Goods by Sea Act, 46 U.S.C. app. §§ 1300-1315 (1988), and the Pomerene Act, 49 U.S.C. §§ 81-124 (1988), provide a statutory framework for dealing with problems arising from the carriage of goods. But this legislation has many significant gaps which have had to be filled by the courts, not the least of which are problems created by the "container revolution" which had not occurred when this legislation was enacted. See *Mitsui & Co. v. America Export Lines, Inc.*, 636 F.2d 807 (2d Cir. 1981). More importantly though, the entire law of charter parties is judge made. 2 Schoenbaum, *supra* note 100, ch. 11 *passim*. The subject of towage is dominated by case law. *Id.* ch. 12 *passim*. Congress has ignored the area of marine insurance and left that important subject to the courts. See generally Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* ch. 2, at 53-92 (2d ed. 1975). Marine pollution on the other hand has become increasingly statutory, but it should be noted that important legislation like the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (Supp. V 1993), has preserved maritime remedies. *Id.* § 2751(e). See also Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993). Although there are some statutes that deal with salvage, that area is primarily controlled by case law. Gilmore & Black, *supra*, ch. 8, at 532-85. Pilotage is a blend of statutory and case law, however, case law dominates the liability issues. 2 Schoenbaum, *supra* note 100, ch. 13 *passim*. Collision law is also a blend of legislation (and administrative regulations) and case law, the latter of which has established the rules of liability and damages. *Id.* ch. 12.

165. See Brown, *supra* note 71, at 249 ("The United States Constitution and Congress have expressly granted admiralty and maritime jurisdiction to the federal courts. Exercising this authority, admiralty judges have enunciated principles of maritime law that provide both certainty to commercial shipping and protection to those who risk their life or property at sea. Moreover, the image of the great maritime judges and their opinions have been a beacon to judges in other areas of the law."). See also John D. Kimball, Miles: "This Much and No More . . .", 25 J. Mar. L. & Com. 319, 320 (1994) ("While Congress unquestioningly has power to pass legislation which affects all aspects of the maritime law, under the Constitution the Court has an equal, if not preeminent, role and is vested with jurisdiction to declare the general maritime law.").

166. See *CEH, Inc. v. FV "Seafarer"*, 153 F.R.D. 491, 496 (D.R.I. 1994) (referring to the "judge-made general maritime law of negligence and unseaworthiness"). An admiralty court can create maritime remedies within the limits imposed by federal statutory maritime law. *Id.* See also *Oil Shipping v. Sonmez Denizcilik Ve Ticaret A.S.*, 10 F.3d 1015 (3d Cir. 1993) (referring to the judge-made principles governing conflict of laws in maritime lien cases); *Brown v. Ivarans Rederi A/S*, 545 F.2d 854, 862 (3d Cir. 1976) ("[I]n the absence of some controlling statute, the general maritime law as accepted by the federal courts constitutes part of our national law applicable to the matters within the admiralty and maritime jurisdiction."). Brown also supports the contention that state statutory law is invalid to the extent that it "works material prejudice to the characteristic features of the general maritime law." *Id.*

ate role for the courts, and has legislatively overruled or modified judge-created law only on rare occasions.

Inasmuch as the Court will have to re-examine *Gaudet* in light of *Miles* (and *Higginbotham*)¹⁶⁷ and only one of these approaches may be able to survive such analysis, *Gaudet* should prevail. This result is suggested not only to keep the law regarding loss of consortium in maritime tort cases consistent with the law in land-based tort cases, but also to maintain the important and unique role of the judiciary in developing the general maritime law.

Q. The DOHSA

In pursuing its twin goals of uniformity and deference to legislation, the *Miles* Court also used the DOHSA as a point of reference. The DOHSA, as the Court noted, provides recovery for "pecuniary loss"; and in *Mobil Oil Corp. v. Higginbotham*,¹⁶⁸ the Court held that damages recoverable under the general maritime law, such as for loss of consortium, may not be awarded to supplement the pecuniary loss recoverable under the DOHSA. *Miles* involved a death in territorial waters, and thus neither the DOHSA nor *Higginbotham*'s judicial gloss on the DOHSA was controlling. As has been demonstrated, maritime personal injury law is far from uniform, and the discrepancy between damages recoverable for deaths occurring in DOHSA waters and those recoverable in *Gaudet* waters, especially on a relatively unimportant damages issue, could have been regarded simply as just another incongruity. The *Miles* Court, however, in pursuit of uniformity, reasoned that, since Congress has expressly limited recovery to pecuniary damages under the DOHSA, this congressionally established standard could not be ignored in formulating a uniform rule to govern loss of consortium claims in seamen's wrongful death actions.

This is a difficult point to contest in light of the Court's earlier decision in *Higginbotham*. Had that decision never been made, the Court could have used the general maritime law to supplement the DOHSA, just as it had used the general maritime law to supplement the Jones Act. However, *Higginbotham* rejected that contention. How could the Court in *Miles* have avoided its application? The Court in *Miles* was faced with the prospect of overruling either *Gaudet* (at least in part) or *Higginbotham*. The *Miles* Court could have overruled *Higginbotham* by saying that, at the time *Higginbotham* was decided, it believed the two rules could co-exist, in that there could be recovery only for pecuniary losses under the DOHSA and recovery for loss of consortium for deaths in territorial waters. There would have been a rational reason for this disparity because the *Moragne-Gaudet* decisions, to some extent, had supplanted

167. It is unlikely the law will develop to the point where no decedent's beneficiary will be able to recover damages for loss of consortium except the survivor of a longshoreman killed in territorial waters. That simply would make no sense.

168. 436 U.S. 618, 624-26, 98 S. Ct. 2010, 2014-15 (1978).

state wrongful death statutes which had been used to provide a remedy for deaths that occurred in territorial and inland waters.¹⁶⁹ Since the *Moragne-Gaudet* decisions were intended to be remedial, it is only logical that they should provide remedies that were at least as expansive as remedies under state law. The *Gaudet* Court adopted a rule allowing recovery for loss of consortium in wrongful death cases because that was the rule in a majority of states. If the Court had now concluded that the two rules could not co-exist, the *Higginbotham* rule could have been abandoned. The Court, however, chose not to do so. Furthermore, although the Court has expressly refused to overrule *Gaudet*, its analysis certainly has undermined it. In fact, as stated above, some lower courts now treat *Gaudet* as, in effect, having been overruled.

It would have been preferable for the Court to have "revised" the *Higginbotham* holding, and not the *Gaudet* holding, notwithstanding the language of the DOHSA. In preferring *Gaudet*, several factors should be considered. First of all, the use of the word "pecuniary" in the DOHSA must be placed in context. As an historical fact, and viewed as a practical matter, the use of the word "pecuniary" adds nothing to the DOHSA statute. The DOHSA is a Lord Campbell-type of wrongful death statute and was enacted in 1920. At that time the universal rule both in the United States and in England was that, under this kind of statute, recovery was permitted only for "pecuniary" loss. That was the conclusion reached by the Supreme Court in the early FELA and Jones Act death cases, notwithstanding that those statutes did not specifically include the word "pecuniary" to qualify the "loss" for which a decedent's dependents could recover. It is reasonable to conclude that, even if the word "pecuniary" had not been included in the DOHSA, the courts would have interpreted the statute as being limited to recovery of "pecuniary loss" as they had done in FELA and Jones Act cases. It is submitted that Congress used the word "pecuniary" not to restrict the scope of damages but to assure that plaintiffs would recover damages in no smaller amount than would have been recoverable in wrongful death actions under generally prevailing state laws. In other words, the DOHSA adopted rules on damages generally applicable at that time in wrongful death cases for deaths occurring on land.

The Maritime Law Association of the United States prepared the original draft of the DOHSA and endorsed it along with the American Bar Association. With respect to damages, the draft proposed that recovery should provide "fair and just compensation, with reference to the pecuniary damages resulting from each injury and death to the deceased's husband, wife or next of kin, severally, not exceeding in all the sum of \$5000."¹⁷⁰ Note that the original version

169. A recent decision by the Third Circuit challenges this conclusion as an absolute rule and holds that under certain circumstances, such as in the case of the death of a recreational boater in state territorial waters, state wrongful death and survival remedies should be applied. *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622 (3d Cir. 1994).

170. George Whitelock, *A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts*, 22 Harv. L. Rev. 403, 416 (1909) (emphasis added).

proposed to Congress contained a limit of \$5,000 as the maximum total amount recoverable. This limitation was rejected by Congress, and no limit is imposed save that under the general Limitation of Liability Act.¹⁷¹ This confirms the conclusion that Congress regarded the DOHSA as remedial legislation and intended it to be subject to the general rules applied in wrongful death actions.

The major reason for preferring *Gaudet* over *Higginbotham* is that *Gaudet* reflects the modern rule on loss of consortium in the United States. The rationale in the early decisions interpreting Lord Campbell-type statutes has been rejected in almost every state. Thus, the approach for interpreting the FELA and the Jones Act in light of the current view on recovery for loss of consortium suggested earlier could be applied to actions brought under the DOHSA as well, and uniformity would be achieved. Would such a construction of the statute in the pursuit of uniformity exact too high a cost in terms of remaining true to the language of the statute? Probably not with regard to *this statute*. The inclusion of the word "pecuniary" in the DOHSA should not, standing alone, constitute an obstacle to a broader remedy under the DOHSA. Furthermore, the Supreme Court, in *Offshore Logistics, Inc. v. Tallentire*,¹⁷² interpreted language in the DOHSA, which purports to confer jurisdiction over DOHSA actions "in the district courts of the United States, in admiralty," as permitting state courts to entertain actions brought under the DOHSA. If that kind of statutory interpretation was not regarded as extravagant, then the interpretation of the word "pecuniary" suggested herein would likewise be within appropriate limits of statutory interpretation. But, even if the Court was not prepared to go that far, it still could have opted to allow the general maritime law to supplement this remedial statute in light of the fact there is no evidence that Congress intended persons who are killed on the high seas to recover less damages than are generally recovered in cases in which people have been killed on land.

R. *Forecasting the Future—Part 2 Placing Limits On Miles*

The discussion of "uniformity" and "legislation" was not undertaken as a mere academic exercise and was not intended as criticism for the sake of criticism. It has been suggested in the foregoing discussion that, although *Gaudet* can be factually distinguished from *Miles* and *Higginbotham*, some lower courts have treated *Gaudet* as having been overruled by *Miles* while other courts, continuing to apply *Gaudet*, have restricted *Miles* to its facts and its holding.

171. See Death on the High Seas Act, 46 U.S.C. app. § 762 (1988) ("[T]he recovery in such suit shall be fair and just compensation for the pecuniary loss sustained by the person for whose benefit the suit is brought . . ."). See also *supra* note 26.

172. 477 U.S. 207, 221, 106 S. Ct. 2485, 2493 (1986) ("These references persuade us that the first sentence of section seven was intended only to serve as a jurisdictional savings clause, ensuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters, and, under DOHSA, for accidents occurring more than one maritime league from shore.").

These conflicts in the lower courts, together with the fundamentally different approaches by the Court in *Gaudet* and *Miles*, may require the Supreme Court to revisit the damages issue and to choose between the *Miles* and *Gaudet* approaches. *Preferably, the rules on damages under the general maritime law in tort cases should be no less generous than the rules applicable under current land-based tort law.*

If the Court is unwilling to overrule *Miles*, must the twin screws of uniformity and deference to legislation drive the resolution of all non-pecuniary damages issues, save pain and suffering of the party injured or killed, in all maritime personal injury and death cases? Not necessarily. There are middle grounds, but they require making distinctions that trench upon uniformity.¹⁷³ If a seaman's beneficiaries are denied recovery for loss of consortium, but others such as beneficiaries of maritime workers and passengers are allowed to recover, the law will not be uniform, even if there is a valid basis for treating the groups differently. Likewise, if the beneficiaries of seamen are denied recovery for loss of consortium in suits against the decedent's employer but are permitted to recover such damages from non-employer defendants, there will be a lack of uniformity even though there may be valid grounds for making the distinction. Finally, if loss of consortium is abolished as a basis for recovery because it is not a pecuniary loss but recovery is permitted for punitive damages, which are also non-pecuniary, there will again be a lack of uniformity. Yet, as a matter of policy, there may be justifications for allowing recovery of punitive damages which simply are not applicable to loss of consortium. If the Court is willing to tolerate some lack of uniformity, there are rational legal arguments for confining *Miles* to its facts or at least almost to its facts.

A clear distinction should be drawn in regard to the punitive damages issue. *Miles* did not involve punitive damages, and the holding of the Court does not purport to address the issue. Punitive damages, in one form or another, are recoverable in virtually every state¹⁷⁴ and have long been recognized in

173. It is hoped the discussion of legislation and legislative interest demonstrates the Court is not mandated by legislation to deny recovery of either loss of consortium or punitive damages. The same may be said with respect to loss of future earnings, although the element of damages is not the focal point of this paper.

174. Forty-three states recognize punitive damages in one form or another; in 38 states, they are available in all tort cases, and in five more states they are available in tort actions, with some causes of action excepted.

Following is a state-by-state examination of punitive damages, distilled from Guide to State Law on Punitive Damages, 8 *Adelphia L.J.* 173 (1992). Alabama: allowed in all tort cases without substantial restriction; Alaska: allowed in all tort cases without substantial restriction; Arizona: allowed in all tort cases without substantial restriction; Arkansas: allowed in all tort cases without substantial restriction; California: allowed only in death cases which resulted in homicide charges, but the amount may not be stated in claim; Colorado: allowed in all tort cases with special restrictions in health malpractice cases; Connecticut: allowed in all tort cases but only as compensation for actual losses, including cost of litigation; Delaware: allowed in all tort cases without substantial restriction; Florida: allowed only in civil actions; Georgia: allowed in all tort cases without substantial restriction; Hawaii: allowed in all tort cases without substantial restriction;

maritime law,¹⁷⁵ even in personal injury cases. Punitive damages are not "pecuniary" as that term is usually defined; but even under the FELA and the Jones Act, certain types of non-pecuniary damages are recoverable. The determination as to whether a particular type of non-pecuniary damages is recoverable should be based on policy considerations and not merely on the "non-pecuniary" label stamped on it. The classification of damages into categories of pecuniary and non-pecuniary, a classification which is of dubious value, should be restricted to compensatory damages, that is, in determining whether recovery should be permitted for certain losses sustained by the plaintiff. No one doubts that a wife whose husband has been killed may have suffered an emotional injury more devastating than any financial loss. The early wrongful death decisions, although denying recovery for such losses, never denied the fact of loss. The issue in such cases has been whether, for reasons of public policy, recovery of damages for such losses should be precluded.

Punitive damages are not compensatory. They are not awarded to compensate an injured party for any loss. Punitive damages, as the name suggests, are awarded to punish tortfeasors. The focal point in awarding compensatory damages is on the injured party—the plaintiff. The focal point in

Idaho: allowed in all tort cases without substantial restriction; Illinois: allowed in some tort cases but not in "healing art or legal malpractice" cases; Indiana: allowed in all tort cases without substantial restriction; Kansas: allowed in all tort cases with special restrictions in medical malpractice and under respondeat superior; Kentucky: allowed in some tort cases, but not allowed in contract, and severely restricted under respondeat superior; Louisiana: allowed only if expressly authorized by statute; Maine: allowed in all tort cases without substantial restriction; Maryland: allowed in all tort cases without substantial restriction; Massachusetts: allowed only if expressly granted by statute; Michigan: allowed in all tort cases but generally used as compensatory, not punitive; Minnesota: allowed in all tort cases but severely restricted under respondeat superior; Mississippi: allowed in all tort cases without substantial restriction; Missouri: allowed in all tort cases without substantial restriction; Montana: allowed only if expressly authorized by statute; Nebraska: none allowed; Nevada: allowed in all tort cases without substantial restriction; New Hampshire: allowed only if expressly authorized by statute; New Jersey: allowed in all tort cases without substantial restriction; New Mexico: allowed in all tort cases without substantial restriction; New York: allowed in all tort cases without substantial restriction; North Carolina: allowed in all tort cases without substantial restriction; North Dakota: allowed in all tort cases without substantial restriction; Ohio: allowed in all tort cases, though there are stricter requirements in products liability cases; Oklahoma: allowed in all tort cases without substantial restriction; Oregon: allowed in most tort cases, but not against health practitioners; Pennsylvania: allowed in all tort cases without substantial restriction; Rhode Island: allowed in all tort cases without substantial restriction; South Carolina: allowed in most tort cases, but not allowed in strict liability cases; South Dakota: allowed in all tort cases without substantial restriction; Tennessee: allowed in all tort cases without substantial restriction; Texas: allowed in all tort cases without substantial restriction; Utah: allowed in all tort cases without substantial restriction; Vermont: allowed in all tort cases without substantial restriction; Virginia: allowed in all tort cases without substantial restriction; Washington: allowed only if expressly granted by statute; West Virginia: allowed in all tort cases without substantial restriction; Wisconsin: allowed in all tort cases without substantial restriction; Wyoming: allowed in all tort cases without substantial restriction.

175. See *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818); *Garay v. Carnival Cruise Line, Inc.*, 904 F.2d 1527 (11th Cir. 1990); *In re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981).

awarding punitive damages is on the injuring party—the defendant. Thus, a decision as to whether punitive damages may be awarded in maritime personal injury cases should not be made with reference to the criteria for recovery articulated in cases such as *Miles* and *Higginbotham*, which determine only which kinds of compensatory damages may be awarded in various maritime personal injury cases. The Jones Act,¹⁷⁶ the DOHSA, and the LHWCA deal with compensatory damages. In the absence of contrary or superseding legislation, the utility of punitive damages in maritime law is a matter of public policy for the courts to decide. It would be an abdication of judicial responsibility to preclude recovery of punitive damages merely because they are “non-pecuniary,” or merely because Congress occasionally has authorized recovery of penalties in certain circumstances¹⁷⁷ and has not similarly provided for punitive damages in the Jones Act and other personal injury and death statutes. A crucial question is whether the possibility of sanctions against defendants in the form of punitive damages promotes safety in the maritime industry. It would not seem to be consistent with the goal of maritime safety to deny recovery for punitive damages in cases in which defendants have manifested a callous disregard for the safety of others on navigable waters, whereas punitive damages would have been awarded if similar callousness had resulted in injury or death on the land.

With respect to damages for loss of consortium, *Miles* should be distinguished from cases involving injuries to or death of a non-seaman. In the view of the *Miles* Court, the Jones Act and the scope of damages recoverable by beneficiaries of a seaman from the seaman’s employer in Jones Act cases were compelling factors in reaching its conclusion as to the scope of damages recoverable in a similar action under the general maritime law. The Court believed itself to be constrained by the Jones Act from giving a designated class of plaintiffs, seamen, a more extensive remedy under judge-made law than “Congress” had, in the Court’s view, seen fit to authorize by statute.¹⁷⁸ This deference to statute is simply not required in situations in which the injured party is not a seaman and neither the Jones Act nor any other statute prescribes the measure of damages. It is important to remember that the Jones Act creates a negligence action that is, in some respects, more advantageous to seamen than an ordinary general maritime law negligence action, for it includes a reduced quantum of proof of negligence and a “featherweight” burden of proving causation.¹⁷⁹ The rights and remedies of non-seamen and their beneficiaries,

176. But see 46 U.S.C.A. § 10313(c) (1988) (entitling a seaman, improperly discharged within one month of the voyage’s beginning, to one month’s wages as compensation, in addition to wages earned); *id.* § 10504(c) (assessing two days wages against the owner as penalty for every day the owner delays payment of wages to the seaman).

177. See *supra* note 176.

178. Again it should be noted neither the FELA nor the Jones Act enumerates the elements of recoverable damages or specifically excludes recovery for any particular element of damages.

179. (i) The Jones Act was to be liberally interpreted in the seaman’s favor, (ii) the seaman had only to prove “slight negligence” which could be accompanied by very little evidence, and (iii)

however, have been created under the general maritime law, and such plaintiffs do not benefit from the reduced quantum of proof of negligence and the "featherweight" burden of proving causation applicable only in Jones Act cases. If these plaintiffs do not enjoy the benefits of the Jones Act, then, in fairness, the detriments derived from the Jones Act should not be imposed upon them.

Some may suggest that, if loss of consortium is denied to a seaman's beneficiaries, recovery should also be denied to all other beneficiaries. The response is simply that the Court in *Miles* did not preclude recovery on the merits of the loss of consortium issue, that is, on whether public policy favors the award of damages for loss of consortium in personal injury and death cases. The Court never decided that loss of consortium is not the kind of loss that should be compensable in a tort action. Recovery was denied primarily because the Court believed it was foreclosed by the Jones Act.¹⁸⁰ If the Court believes that an award for loss of consortium is a proper item of tort damages, then it should permit such an award where not restricted by statute. The availability of the Jones Act in cases involving seamen makes it easier to prove a case but, under *Miles*, damages may be restricted. The unavailability of the Jones Act, in the case of non-seamen, makes it more difficult to prove a case, but all proper tort damages should be recovered. As far as recovery for loss of consortium, some plaintiffs will have the misfortune of being beneficiaries of a seaman, but that is no reason to inflict that unfortunate circumstance on non-seamen. In these situations, only a rigid and narrow adherence to uniformity would require denial of damages for loss of consortium to beneficiaries of non-seamen. Moreover, weighing against this narrow view of uniformity is the important interest of treating all parties in personal injury and death cases equally, regardless of whether the tort is maritime or land-based.

Of course, should death occur on the high seas, the DOHSA comes into play and the distinction between seamen and non-seamen is inapplicable, because the DOHSA applies to all persons killed on the high seas regardless of the status of

adjudication by a presumably seaman-sympathetic jury in Jones Act cases was congressionally intended to provide "part of the remedy." *Allen v. Seacoast Prods., Inc.*, 623 F.2d 355, 360 (5th Cir. 1980) (quoting *Boeing Co. v. Shippman*, 411 F.2d 365, 371 (5th Cir. 1969) (en banc)). See also *In re Cooper/T. Smith*, 929 F.2d 1073, 1076-77 (5th Cir. 1991) ("Under the Jones Act, a defendant must bear the responsibility for any negligence, however slight, that played a part in producing plaintiff's injury."); Force, *supra* note 11, at 7-8.

180. This point was seized upon by the court in *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 644 (3d Cir. 1994), which stated:

[I]n an accident on a ship in which a non-seaman and a seaman were each killed, the non-seaman's survivors would potentially be entitled (depending on the state statute) to higher damages than those available to the survivors of the seaman. This result, however, is untenable only if we assume that a person's statutory status should be irrelevant for purposes of determining recovery for maritime deaths. But *Miles*, by denying loss of society damages to the survivor of a seaman because the seaman was covered by the Jones Act, has told us that such status does make a difference.

the decedent and the tortfeasor. It seems, in such situations, that loss of consortium could not be recovered short of overruling *Higginbotham*, as suggested earlier, or re-examining the significance of the word "pecuniary" in the DOHSA in light of the prevailing view in the United States on recovery of damages for loss of consortium.

A distinction should also be made between a suit brought by a seaman's beneficiaries against the decedent's employer and a suit against a non-employer defendant. The Jones Act creates a negligence action only against a seaman's employer. It does not create any rights against non-employers. Therefore, there is neither a statute nor a congressional policy restricting the award of damages in suits against non-employers. There are rational reasons for allowing a seaman's beneficiary to recover loss of consortium against a non-employer and yet deny recovery against an employer. The first is based on the Court's premise in *Miles* that, under the Jones Act, Congress intended to restrict recovery in wrongful death actions to pecuniary loss. As stated above, the Jones Act creates a negligence action that is more advantageous to seamen on the liability issue than the general maritime law negligence action. It may be argued that the restriction on the scope of damages should be considered as part of a "trade-off." In other words, Jones Act beneficiaries get the benefit of substantive rules which make it easier to establish liability, and employers get the benefit of the "pecuniary" damages restriction. However, in actions against a non-employer, a person who happens to be a Jones Act seaman is relegated to the general maritime law, as is a non-seaman. Where the beneficiaries of a seaman cannot bring suit under the Jones Act and invoke the benefits of that statute because the defendant was not the decedent seaman's employer, it seems unfair to impose the Jones Act detriment by way of restrictions on damages. The Jones Act imposes liability on a specified class of defendants, employers of seamen. The court in *Miles* believed itself constrained by the Jones Act from imposing on this designated class of defendants more extensive liability under judge-made law than Congress had seen fit to authorize. This deference to the Jones Act employer is inapplicable in an action against a defendant who was not the seaman's employer. None of the major cases decided by the Supreme Court, *Sieracki*, *Moragne*, *Gaudet*, or *Alvez*, involved a suit against the decedent longshoreman's or injured longshoreman's employer. Suits against employers are virtually precluded under the LHWCA. Thus, the rules applicable to suits by seamen and maritime employees against their employers and suits by seamen and maritime employees against non-employers have always differed.

A rigid pursuit of uniformity could result in other inequities. Assume that three people are on Vessel 1 in territorial waters: a seaman, a longshoreman, and a passenger. Another vessel, Vessel 2, is operated negligently and collides with Vessel 1, killing all three persons. Wrongful death actions are commenced against Vessel 2 in regard to each death. Why should the seaman's dependents not be able to recover the same damages as the others? As to a suit against a stranger who is not the employer, the seaman should not be regarded as a seaman at all. His status *vis-a-vis* the stranger is no different than that of the

longshoreman or the passenger. His dependents are not basing any special claim on his capacity as a seaman. An allegation that he was a seaman on Vessel 1 is irrelevant to the wrongful death claim. Therefore, *Miles* should not control this collision situation or any other situation in which the decedent's status as seaman is irrelevant to the claim.¹⁸¹

By contrast, it is difficult to formulate a meaningful distinction in suits against a seaman's employer, on the loss of consortium issue, between injuries that do not result in death and those that do, as was the case in *Miles*. One might argue that the DOHSA is not relevant, and that, in the Jones Act, Congress excluded the recovery of a beneficiary's non-pecuniary damages in a wrongful death action, but Congress has not addressed the right to recover loss of consortium in a non-death case. But this argument is not persuasive. There is no reason to believe that Congress intended to deny recovery for loss of consortium in death cases but to allow recovery in personal injury cases. Either the Jones Act precludes the recovery for loss of consortium, or it should be reinterpreted to permit recovery directly, as suggested above, or supplementally, through the general maritime law. It is difficult to understand how a principled distinction could be made without overruling *Miles* and some earlier cases.

It is also difficult to formulate a meaningful distinction on the loss of consortium issue between a dependent spouse-plaintiff and the non-dependent parent-plaintiff in *Miles* in suits against a deceased seaman's employer. To introduce such a distinction at this time would require *Miles* to be overruled almost in its entirety, for this is precisely the distinction drawn by the Fifth Circuit and a majority of lower courts that was clearly rejected by the Supreme Court.

S. Conclusion

The holding in *Miles*, that damages for loss of consortium and for future lost wages are not recoverable in a general maritime law action arising from the death of a Jones Act seaman, is not a momentous development. In a narrow sense, it means only that a decedent's family will recover somewhat less than if those items were included as elements of damages. What is disturbing, however, is the rationale for the Court's decision. The approach taken by the Court creates considerable uncertainty as to the scope of its decision. As has been demonstrated above, the *Miles* decision has created more questions than answers. It is possible that the problems created by *Miles*' rationale will snowball in the lower federal courts resulting in the disappearance of elements of damage or even substantive causes of action which heretofore have been well-established in maritime law. The Court's approach introduces needless disunity between land-based tort law and maritime tort law, and ignores the trends and develop-

181. It should be noted, however, the observations with respect to the DOHSA made in the discussion of non-seamen are applicable here.

ments in modern American tort law. If extended to other issues, this approach represents a threat to the concept of the "general maritime law" as it has developed from the very beginning of this country. To suggest, as the Court has in *Miles*, that one or two tersely written remedial statutes enacted to deal with specific shortcomings in the common law somehow preempt the courts from developing and applying related general maritime rules is distressing and bodes ill for the future. Congress undeniably has the authority to enact a comprehensive code of maritime personal injury law, but it has not chosen to do so! Historically, Congress has fixed a problem here and has modified a judicial rule there. In the main, however, Congress appears to have been content with its partnership with the courts, which has allowed it to enact legislation only when the courts have not created a satisfactory response to a problem.

The late Judge John R. Brown understood the broader and more troublesome aspects of the decision in *Miles*. He realized that the approach followed by the Court represented a *radical* departure from the historical role of admiralty judges in the United States and that this departure threatened the traditional partnership between the admiralty courts and Congress. As he presciently observed:

The decisions in *Higginbotham* and *Miles* represent a complete reversal of the roles of admiralty judges and Congress. Prior to these decisions, admiralty judges exercised their Constitutional duty to declare the admiralty and maritime law based on enlarged principles of justice combined with the customs and usages of the sea. Admiralty judges were not bound by technical rules, common law distinctions, feudal concepts or limitations imposed by jealousy-based wars about jurisdiction in England. Seamen were considered to be wards of the admiralty court and were treated with special solicitude by admiralty judges.

....

The reversal of roles articulated by the current Supreme Court denigrates not only the Constitutional duty entrusted to admiralty judges; it also turns back two centuries of leadership of both the admiralty law and the common law. The mere fact that Congress has legislated in an area is insufficient to preempt maritime remedies in the absence of Congressional purpose to do so. The affirmative intervention of Congress in the maritime field should be interpreted in a positive and supportive fashion and should not be used to emasculate the power of admiralty judges to declare admiralty law. As Justice Story concluded, even a strong implication by Congress is insufficient to deprive admiralty judges of their duty to enunciate the law in conformity with governing maritime principles. Only an express prohibition by Congress can serve to deny admiralty judges the power to declare admiralty law which was delegated to them by the Constitution.¹⁸²

182. Brown, *supra* note 71, at 283-84.

The curse of *Miles v. Apex Marine Corp.* has caused some lower federal courts to abandon their traditional role as admiralty judges. The approach used by the Court in *Miles* is beginning to exert an hypnotic effect on some federal judges, leading them to forsake substance for form. The lure of "uniformity" has drawn and will continue to draw courts to a mechanical, rather than a reasoned, approach to the resolution of issues. Congressional legislation has become talisman; and, worse yet, "deference to legislative intent," both real and imagined, has enticed some federal judges into abandoning their unique, important, and constitutional responsibility in declaring the general maritime law.¹⁸³ A careful study of history, the value of tradition, and the very difficult task of balancing competing interests in the light of the policies of federal maritime law are being abandoned for the "easy" way out.

183. Kimball, *supra* note 165, at 330-32. The author concludes that *Miles* detracts from the longstanding role of the Admiralty Court, quite unnecessarily. Deference to a co-equal branch of government is one thing, but actually saying that the Court is limited in the field of maritime law by what Congress decides is quite another. . . . *Miles* is a step in the wrong direction which sacrifices the Admiralty Court's independence, and . . . the lower courts are already following in the wrong direction. *Id.* at 332.